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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-5555

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF ALABAMA

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QUESTIONS PRESENTED

I.

WHEN THE STATE OF ALABAMA TRIED, CONVICTED AND SENTENCED PETITIONER TO DEATH FOR A MURDER THAT OCCURRED IN THE TERRITORIAL JURISDICTION OF THE STATE OF GEORGIA AND WHEN FOR THE SAME MURDER PETITIONER HAD ALREADY BEEN CONVICTED AND SENTENCED TO LIFE IMPRISONMENT BY THE STATE OF GEORGIA, DID THE STATE OF ALABAMA VIOLATE THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT?

II.

DOES THE CONCEPT OF DUAL SOVEREIGNTY PERMIT THE STATE OF ALABAMA TO TRY AND CONVICT AN INDIVIDUAL FOR THE SAME CONDUCT FOR WHICH HE HAD ALREADY BEEN CONVICTED AND SENTENCED BY THE STATE OF GEORGIA, WHEN THE CONDUCT IS NOT LEGALLY DISTINGUISHABLE AND SERVES IDENTICAL PURPOSES UNDER BOTH CAPITAL MURDER STATUTES, AND DOES THIS ACTION BY THE STATE OF ALABAMA CONFLICT WITH THIS COURT'S RATIONALE IN BROWN v. OHIO, 432 U.S. 161 (1977)?

III.

WHEN THE STATES OF ALABAMA AND GEORGIA CLOSELY COOPERATED IN THE INVESTIGATION AND PREPARATION OF THE MURDER CASE AGAINST PETITIONER, DID THE ALABAMA PROSECUTION OF THE MURDER WHICH FOLLOWED THE DISPOSITION OF THE SAME MURDER CHARGES BY THE STATE OF GEORGIA VIOLATE THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES?

IV.

WHEN THE STATE OF ALABAMA SENTENCED AN INDIVIDUAL TO DEATH FOR A MURDER FOR WHICH THAT INDIVIDUAL HAD ALREADY RECEIVED A SENTENCE OF LIFE IMPRISONMENT FROM THE STATE OF GEORGIA, DOES THAT DEATH SENTENCE VIOLATE THE CONSTITUTIONAL PRINCIPLES ENUNCIATED IN BULLINGTON v. MISSOURI, 45. U.S. 430 (1980), AND ARIZONA v. RUMSEY, 104 S.Ct. 2305 (1984)?

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v.	*	No. 84-_____
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	*	
STATE OF ALABAMA,	*	
	*	
Respondent	*	

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

Petitioner, Larry Gene Heath, requests that a writ of certiorari issue to review the judgment of the Supreme Court of Alabama in Ex parte: Larry Gene Heath, ___ So.2d ___ (Ala. July 6, 1984). Larry Gene Heath is currently under sentence of death in the State of Alabama.

CITATION TO OPINION BELOW

The opinion of the Supreme Court of Alabama was rendered on July 6, 1984. The Supreme Court of Alabama affirmed the judgment of the Alabama Court of Criminal Appeals. Ex parte: Larry Gene Heath, ___ So.2d ___ (Ala. July 6, 1984) (Attached hereto as Appendix A).

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on July 6, 1984. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). On August 28, 1984, Mr. Justice Powell granted an application for extension of time to file this petition for writ of certiorari, until and including October 4, 1984.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Fifth, Eighth and Fourteenth Amendments to the Constitution of the United States.

This case also involves the following provisions of the Georgia and Alabama Codes, the texts of which are contained in Appendix B attached to this petition:

Georgia Code Annotated §26-1101 [OCGA §16-5-1]

Georgia Code Annotated §27-2528 [OCGA §17-10-32]

Georgia Code Annotated §27.2534.1(b) [OCGA §17-10-30(b)]

Alabama Code §13A-5-40(a)(1)

Alabama Code §13A-5-53(b)(2)

Alabama Code §15-2-3

HOW THE ISSUES WERE RAISED BELOW

Each of the constitutional issues in the Questions Presented above were raised in the trial court, on appeal to the Alabama Court of Criminal Appeals and in the Alabama Supreme Court; all were decided adversely to Petitioner.

STATEMENT OF THE CASE

(i) Statement of Facts

August 31, 1981, the body of Rebecca Heath was found in the back seat of a car, off the side of a road in Troup County, Georgia. On November 3, 1981, Petitioner, Mr. Larry Heath, who was the husband of Rebecca Heath, and five other persons were indicted for her murder by a grand jury of Troup County, Georgia. The indictment alleged that "on the date of August 31, 1981, in the County aforesaid, [the six named persons] did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon." Record at 740-1, 750-1, 798-9.

On November 3, 1981, the State of Georgia served notice of an aggravating circumstance, thereby informing Petitioner that it would seek the death penalty.

On February 10, 1982, in the Superior Court of Troup County, Georgia, Petitioner pled guilty to the murder, and received a sentence of life imprisonment.

(ii) Course of the Proceedings

On May 5, 1982, almost three months after the disposition of the charges in Georgia, Petitioner was indicted by a grand jury of Russell County, Alabama for the murder during a kidnapping of Rebecca Heath. The indictment did not alleged the location of the commission of any element of the offense.

On December 10, 1982, Petitioner's pleas of autrefois convict and former jeopardy under the Alabama Constitution and the Fifth, Eighth and Fourteenth Amendments to the United States Constitution were denied.

On January 12, 1983, the Petitioner's pleas of autrefois convict and former jeopardy, and his plea to jurisdiction, were denied.

On January 12, 1983, at the guilt-finding phase of his trial, a jury found Petitioner guilty on the charges in the indictment. At the sentence-determining phase, the jury fixed Petitioner's punishment as death. The trial judge then sentenced Petitioner to death.

On July 5, 1983, the Alabama Court of Criminal Appeals affirmed Petitioner's death sentence, and rejected his claims of autrefois convict and former jeopardy under the Alabama and United States Constitutions. Larry Gene Heath v. State, No. 4 Div. 134 slip op. (Ala. Crim. App. July 5, 1983).

On July 6, 1984, the Alabama Supreme Court affirmed Petitioner's death sentence, and rejected his claims of autrefois convict and former jeopardy under the Alabama and United States Constitutions. Ex Parte: Larry Gene Heath, No. 82-1060 slip. op. (Ala. July 6, 1984).

REASONS FOR GRANTING THE WRIT

It should be noted that this Court has recently granted certiorari in Fugate v. New Mexico (No. 83-6663, October 1, 1984), where the Court has been asked to elaborate on the relationship between jurisdictional limitations and double jeopardy. For reasons below, this petition also presents questions concerning jurisdictional limitations and double jeopardy.

I.

WHEN THE STATE OF ALABAMA TRIED, CONVICTED AND SENTENCED PETITIONER TO DEATH FOR A MURDER THAT OCCURRED IN THE TERRITORIAL JURISDICTION OF THE STATE OF GEORGIA AND WHEN FOR THE SAME MURDER PETITIONER HAD ALREADY BEEN CONVICTED AND SENTENCED TO LIFE IMPRISONMENT BY THE STATE OF GEORGIA, THE STATE OF ALABAMA VIOLATED THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES, MADE APPLICABLE TO THE STATES BY THE FOURTEENTH AMENDMENT.

The State of Alabama has tried and convicted Mr. Heath for a murder which apparently all parties concede occurred in Georgia. The indictment under which Mr. Heath was convicted in Georgia alleged that the murder of Rebecca Heath occurred on August 31, 1981, in Troup County, Georgia. The indictment under which Petitioner was convicted in Alabama alleged only that the murder had occurred prior to the date of the indictment , and did not allege the location of the commission of any element of the charged offense. Furthermore, the evidence of the State's witnesses at trial only supports the conclusion that the killing occurred in Georgia. The car in which the body was found in Georgia was left at the side of the road at 9:15 a.m. on August 31, 1981. Record at 334-9. A witness who saw a person in the back seat at 9:15 a.m. said the windows of the car were fogged on the inside, apparently because someone was breathing in the car. Id. When examined in the car at 11:15 a.m. the body was still extremely warm. Record at 348-57 (testimony of Chief Investigator of Troup County, Georgia Sheriff's Office).

By trying, convicting, and sentencing Petitioner for a crime which occurred in Georgia, and for which he had already been convicted and sentenced by the State of Georgia, Alabama placed Petitioner in jeopardy for a second time for the same offense, and therefore violated the Fifth Amendment's prohibition of double jeopardy. When a defendant has been punished for a particular crime, the principles of fairness and finality embodied in the double jeopardy clause require that he not be subjected to the possibility of further punishment by again being tried or sentenced for the same offense. United States v. Wilson, 420 U.S. 332, 343 (1975); Ex Parte Lange, 85 U.S. (18 Wall.) 163, 168 (1874). [1]

The State of Alabama would apparently justify its extraordinary attempt to exercise jurisdiction over the murder that occurred in Georgia on the ground that the activity leading to the killing of Rebecca Heath was done in part in Alabama. Such a remarkable abrogation of power flatly contradicts the limits of state sovereignty t[illegible]t upon which the nation's political structure is premised, and this Court should not

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1. The Georgia courts have obviously found that the killing occurred in Georgia, given Petitioner's indictment, conviction, and sentence. Cf. Owens v. State, 251 Ga. 313, 305 S.E.2d, 102 (Ga. 1983), and Lambert v. Jones, 250 Ga. 603, 299 S.E.2d 716 (1983), Both concerning the murder of Rebecca Heath). The principles reflected in the Full Faith and Credit Clause of the United States Constitution suggest that the Alabama prosecution should therefore have been barred. Furthermore, Petitioner's appeal raises the important question of the scope of the double jeopardy clause's requirement of collateral estoppel and related principles. Cf. Ashe v. Swenson, 397 U.S. 436 (1973). That the double jeopardy clause may require extension of collateral estoppel principles to prosecutions by different sovereigns has been suggested by the rulings of a number of courts. E.g., State v. Hogg, 118 N.H. 262, 266, 395 A 2nd 844, 846-7 (N.H. 1978); State v. O'Kelly, 211 N.W.2d 89, 593-5 (Iowa 1973); United States v. Addington, 471 F.2d 560, 566-8 (10th Cir. 1973). But cf. Standefer v. United States, 447 U.S. 10 (1980). This issue should be resolved by this Court given the importance of the question and the considerable conflict between various courts over the proper answer.

countenance the failure of the State of Alabama to respect the limits of its legitimate authority. No American State, prior to Alabama's effort to convict Mr. Heath, has claimed that it has universal criminal jurisdiction without regard for territorial boundaries. W. LaFave & A. Scott, Handbook on Criminal Law, 125, (1972). "It is fundamental that jurisdiction resides solely in the courts of the state or country where the crime is committed, and the laws of each state or country exclusively govern the nature of the offense." 21 Am. Jur. 2d Criminal Law, Sect. 343 (1981). Indeed, these principles are reflected in this Court's pronouncements that a state's penal laws will not be given extraterritorial effect by the courts of other jurisdictions. Huntington v. Attrill, 146 U.S. 657, 669, 671-3 (1892). In the case of Mr. Heath, the State of Alabama is claiming the right to try him free of these time honored limits on the scope of state authority. To allow the States of Alabama to do so would be to make a mockery of the right not to be placed in jeopardy twice for the same offense.

Mr. Heath is not presently contesting the jurisdiction of the State of Alabama over an allegation of kidnapping that may have occurred in Alabama, but it must be remembered that Mr. Heath was charged not with kidnapping but with the capital offense of murder during a kidnapping. According to the Alabama Supreme Court, which is the final arbiter on the meaning of Alabama law ". . . in order for the death sentence to be imposed . . . an intentional killing must be shown . . . The capital offenses set forth in Sect. 13A-5-31 contain an 'intentional killing,' the gravamen, and aggravation." Dobard v. State, 435 So.2d 1338 (Ala. 1983).[2] Thus, it is the killing that is the essence of

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2. It is true that Dobard concerned the immediate past codification of capital offenses in Alabama. However, an examination of the statutes reveals no material alteration. [footnote continues, next page]

> States and the National Government are separate political communities. State and Federal Governments '[derive] power from different sources,' each from the organic law that established it. United States v. Lanza, 260 U.S. 377, 382. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.' Ibid. And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power."

The Supreme Court has never considered the question of the applicability, vel non, of the "dual sovereignty" doctrine to consecutive prosecutions by two states. It is clear that the "dual sovereignty" concept does not apply in every instance where successive cases are brought by separate entities. For instance, a state and a municipal subdivision of the same state cannot bring successive prosecutions for offenses arising out of the same conduct. Waller v. Florida, 397 U.S. 387 (1970). The states of Alabama and Georgia are clearly separate political sovereignties, however. If, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-a-vis the federal government then surely it is a sovereign entity vis-a-vis

this charge. That killing occurred in Georgia, and Alabama does not have jurisdict.. .ver it.[3]

If Alabama is allowed to treat the fourteen aggravating circumstances in its capital punishment statute as essential elements of the offense for jurisdictional purposes, ridiculous and unjust results can ensue. For example, Ala. Code Sect. 13A-5-40(a)(6) (1981) makes "murder committed while the defendant is under sentence of life imprisonment" a capital offense. Ala. Code Sect. 13A-5-40(a)(13) (1981) provides capital punishment for 'murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime." These aggravating circumstances would give Alabama jurisdiction over homicides committed anywhere in the world with no link between the crime and Alabama but some past act of the defendant unrelated to his present crime.

If a State may punish conduct outside its borders without limitation, and without regard for the question of whether such conduct has been prosecuted in the courts of the jurisdiction

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[Footnote 2, continued]
Indeed, in Ex parte Bush, 431 So.2d 563 (Ala. 1983), the Alabama Supreme Court held that a particular indictment mistakenly citing the 1975 capital offense statute rather than the next and current codification was a merely technical harmless error. Id. at 564-5, Alabama has interpreted its capital offenses as composed of the gravamen of murder plus an aggravating circumstance which is not the gravamen for the simple reason that crimes other than intentional killings cannot be punished with the death penalty. Ex parte Kyzer, 399 So.2d 330, 335 (1981). See Gregg v. Georgia, 428 U.S. 153 (1976).

3. That Alabama has overreached its criminal jurisdiction is supported by the reasoning of the Alabama Supreme Court in Baldwin v. State, 372 So. 2d 32 (Ala. 1979). The court there dealt with a robbery and abduction in North Carolina that culminated in a killing in Alabama. The court said,"although the offense was commenced in North Carolina, it was not consummated until Naomi Ronlon was killed in Monroe County, Alabama. The place where the crime was consummated is the place where the crime was committed and the place where the defendant may be tried. 21 Am. Jur. 2d Criminal Law Sect. 399, at 416.: Id. at 33. The court's language suggests that Alabama has adopted an inconsistent and unjustified theory of extraterritorial jurisdiction in Mr. Heath's case.

where it occurred, then the prohibition against double jeopardy will be gutted. Any conceivable nexus could be sued to obtain criminal jurisdiction, for example State residency of the alleged criminal, the victim, the victim's relatives or his or her friends. Transitory fortuities should not provide a basis for jurisdiction, particularly where the State in which the essential conduct occurred has already taken criminal jurisdiction of that conduct. This Court has never pronounced the limits which the Fifth and Fourteenth Amendments place upon a State's exercise of extraterritorial jurisdiction, yet if the Fifth Amendment's prohibition of double jeopardy and the proper operation of the Federal system are to be preserved, then it is vital that those limits be established. Certiorari should therefore be granted.

II.

THE CONCEPT OF DUAL SOVEREIGNTY DOES NOT PERMIT THE STATE OF ALABAMA TO TRY AND CONVICT AN INDIVIDUAL FOR THE SAME CONDUCT FOR WHICH HE HAD ALREADY BEEN CONVICTED AND SENTENCED BY THE STATE OF GEORGIA, WHEN THE CONDUCT IS NOT LEGALLY DISTINGUISHABLE AND SERVES IDENTICAL PURPOSES UNDER BOTH CAPITAL MURDER STATUTES, AND THUS ACTION BY THE STATE OF ALABAMA CONFLICTS WITH THIS COURT'S RATIONALE IN BROWN v. OHIO, 432 U.S. 161 (1977).

Even if it can be argued that Alabama had jurisdiction over Petitioner's case, the double jeopardy clause should preclude the exercise of that jurisdiction given that Petitioner has already been convicted and sentence by Georgia, the State where the murder occurred. It is one thing to have jurisdiction over a matter; it is another to exercise it properly. For example, this Court has stated that where two States exercise concurrent jurisdiction over a border river, only one State may actually bring a prosecution for a crime committed on the river. Nielsen v. Oregon, 212 U.S. 315, 320 (1909) (dictum). Concurrent jurisdiction in such situations ensures that difficulties of

proving territorial jurisdiction do not allow a criminal to evade prosecution. But once one of the two States has brought a prosecution the interests of the defendant that are reflected in the double jeopardy clause exceed any interest of the second State in bringing a second prosecution.

Similarly, in Brown v. Ohio, 432 U.S. 151 (1977), the defendant committed the offense of theft and operation of a car in the cities of Wickliffe and East Cleveland. Either city could have prosecuted the defendant. The Wickliffe officials proceeded first, charging the defendant with joyriding, a lesser included offense of theft and operation of a car. Subsequently, East Cleveland officials charged the defendant with auto theft. This court held that the second charge violated defendant's double jeopardy rights. Even though the offense had occurred in both jurisdictions, the defendant could only be tried for it once.

Brown v. Ohio, is applicable to this case. Even if Alabama and Georgia both had jurisdiction over the killing of Rebecca Heath, once Georgia exercised that jurisdiction Alabama was precluded from doing so. Thus, this Court should grant certiorari in order to vindicate Mr. Heath's double jeopardy rights.

This conclusion is further supported by a consideration of the concept of dual sovereignty. [4] Although Petitioner's research has not revealed any Federal case on the question of the applicability of dual sovereignty theory to successive State prosecutions, an analysis of this Court's dual sovereignty cases results in the conclusion that the concept of dual sovereignty

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4. The following cases in this Court have cast doubt upon the continuing vitality of dual sovereignty theory: Elkins v. United States, 364 U.S. 206 (1960); Murphy v. Waterfront Commission, 378 U.S. 52 (1964); Benton v. Maryland, 395 U.S. 784 (1969); Ashe v. Swenson, 397 U.S. 436 (1973). However, the theory need not be rejected to be found inapplicable to the present case.

should not be extended to situations comparable to the present case. Given the significance of the issues raised by this case it is vital that this Court grant certiorari to provide guidance in this area.

In Bartkus v. Illinois, 359 U.S. 121, reh'g denied, 360 U.S. 907 (1959), the Court ruled by a five to four vote that an Illinois conviction for armed robbery which followed a Federal acquittal on the charge of robbing a Federally insured savings and loan association did not violate due process. In large measure this conclusion was seen as a necessary corollary of federalism, yet that concern militates against the extension of the dual sovereignty rule to prosecutions by two States, for such prosecutions, if they truly arise out of the same conduct, inevitably involve the interference by at least one State in conduct occurring within territorial boundaries of another. Moreover, such an occurrence is analogous to the situation in Brown v. Ohio, where it was concluded that only one of two governmental units of equal stature could exercise jurisdiction over a single offense.

Another justification for the result in Bartkus was that the separate prosecutions in Bartkus served different interests. The federal prosecution served to protect the federal banking scheme and the state prosecution served the state interest in preserving law and order. In the case of Mr. Heath, however, there are absolutely no distinct interests served by the Alabama prosecution.[5] Thus, dual sovereignty should not be interpreted to allow multiple prosecutions of Mr. Heath for the same offense where the only value served by such a prosecution is the evisceration of the double jeopardy clause.

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5. The State has never denied that, at least as applied to the present case, the statutes are identical as to law and fact. See e.g., the State's brief before the Alabama Supreme Court at 20-1.

If the State of Alabama is allowed to proceed on the theory of dual sovereignty in the present case, then it is difficult to see what limit the double jeopardy clause will place upon prosecutions egregiously violating the principles which underlie this fundamental constitutional provision. The State of Alabama has suggested no delimitation of the necessary nexus between a crime and a State for that State to punish that crime. Even setting aside any suggestion that the State of Alabama has overreached its territorial jurisdiction, the fact remains that the State cannot identify a valid interest served by its prosecution that was not served by that brought in the State of Georgia.[6] Without such interests existing, multiple prosecutions under the rhetoric of "dual sovereignty" ought not to be allowed. Accordingly, this Court should grant certiorari in order to clarify the scope of "dual sovereignty" and to vindicate Mr. Heath's rights.

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6. To allow such a prosecution simply to give the State of Alabama a chance to raise Petitioner's penalty from life imprisonment to a death sentence is hardly a compelling rationale, and is profoundly inconsistent with the basic principles underlying the prohibition of double jeopardy. Commonwealth v. Mills, 447 Pa. 163, 171, 286 A.2d 638, 641 (1971); Turley v. Wyrick, 554 F.2d 840, 843 (8th Cir. 1977) (Lay, J., Concurring). Cf. Arizona v. Rumsey, 104 S.Ct. 2305 (1984). In vindictiveness cases, such a result is sufficient to trigger a presumption of improper motive, even where different prosecutors are involved. Thigpen v. Roberts, 104 S.Ct. 2917, 2919 (1984).

III.

WHEN THE STATES OF ALABAMA AND GEORGIA CLOSELY COOPERATED IN THE INVESTIGATION AND PREPARATION OF THE MURDER CASE AGAINST PETITIONER, THE ALABAMA PROSECUTION OF THE MURDER WHICH FOLLOWED THE DISPOSITION OF THE SAME MURDER CHARGES BY THE STATE OF GEORGIA VIOLATES THE DOUBLE JEOPARDY CLAUSE AND THE EIGHTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

The fact that the State of Alabama did not seek to indict Petitioner until after the conclusion of the Georgia prosecution is disturbing. The State of Georgia apparently wanted and thought Petitioner would testify against other persons allegedly involved in Rebecca Heath's murder. Record at 23-6. Petitioner refused to do so. Id. His prosecution in Alabama commenced thereafter.

The two States cooperated very closely in the investigation and preparation of the case against Petitioner. See e.g., Record at 308-9 (opening statement of prosecution describing some of the cooperation between Georgia and Alabama law enforcement personnel); Record at 251-3, 366-7 (testimony of Sheriff of Russell County, Alabama, as to cooperation with Sheriff's Department of Troup County, Georgia); Record at 372, 383-5, 386, 387-90 398-9 (testimony of chief investigator, Sheriff's Department of Russell County, Alabama, including statement that investigations by Russell County investigation and cooperation with Troup County, Georgia Sheriff's Department led to the Georgia indictment).

The extent of the cooperation between the two sovereigns in this case may well run afoul of the double jeopardy prohibition despite the dual sovereignty theory. United States v. Aboumoussallem, 726 F.2d 906, 910 (2nd Cir. 1984); Bartkus v. Illinois, 359 U.S. 121, 122-4, reh'g denied, 360 U.S. 907 (1959). Such cooperation makes the fiction of prosecution for different offenses all the more tenuous, and becomes the cooperation of two sovereigns to deny an individual the protection of the Fifth

Amendment's prohibition of double jeopardy. Such whipsawing is certainly repugnant. Cf. Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (actions of two sovereigns in combination may violate Fifth Amendment's prohibition of coerced self-incrimination).

The point at which cooperation between two sovereigns becomes so great as to make the dual sovereignty theory inapplicable and therefore to violate the prohibition against double jeopardy is another important issue raised by this case, and is therefore an additional reason for the Court to grant certiorari.

IV.

WHEN THE STATE OF ALABAMA SENTENCED AN INDIVIDUAL TO DEATH FOR A MURDER FOR WHICH THAT INDIVIDUAL HAD ALREADY RECEIVED A SENTENCE OF LIFE IMPRISONMENT FROM THE STATE OF GEORGIA, THAT DEATH SENTENCE VIOLATES THE CONSTITUTIONAL PRINCIPLES ENUNCIATED IN BULLINGTON v. MISSOURI, 451 U.S. 430 (1980), AND ARIZONA v. RUMSEY, 104 S.Ct. 2305 (1984).

Petitioner was indicted for murder in Georgia under Ga. Code Ann. §26-1101 [OCGA §16-5-1]. That section reads as follows:

> §26-1101 Murder; felony murder.
>
> (a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

After indicting the Petitioner, the State of Georgia served notice of aggravating circumstances, thereby advising Petitioner of its intention to seek the death penalty. Ga. Code Ann. §27-2534.1(b)(6) [OCGA §17-10-30(b)(6)]. Petitioner eventually pleaded guilty and was sentenced to life imprisonment. The State has tried, convicted and sentenced the Petitioner to death for the same murder.

In Bullington v. Missouri, 451 U.S. 430 (1980), this Court ruled that a sentence of death after a defendant's retrial, where

that defendant had received a sentence of life imprisonment at his first trial, violated the prohibition against double jeopardy. This Court emphasized that the nature of the Missouri capital sentencing proceeding made it comparable for double jeopardy purposes to a trial on guilt or innocence; in effect, the defendant had at his first trial been acquitted of the death penalty.

Similarly, in Arizona v. Ramsey, 104 S.Ct. 2305 (1984), the trial judge had imposed a sentence of life imprisonment, after conducting a death penalty hearing. The State supreme court ruled that the trial judge had incorrectly defined one aggravating circumstance too narrowly at the hearing, and remanded the case to the trial judge for a second determination of whether to sentence the defendant to death. This Court held that this procedure violated the principles enunciated in Bullington.

This Court has emphasized the anxiety and ordeal suffered by the defendant as the essence of the harm which the Constitution seeks to avert in such cases. Arizona v. Rumsey, 102 S.Ct. 2305, 2310 (1984). Petitioner was indicted and served with notice of an aggravating circumstance by the State of Georgia. He received a sentence of life imprisonment, which amounts under Bullington to an acquittal as to any sentence of death. Subsequently, the State of Alabama sought and received a death sentence of Petitioner for the same murder.[7] Surely, this is what the

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7. This conclusion does not depend upon rejection of the dual sovereignty theory. The actions of two sovereigns may in combination violate provisions of the Constitution. Murphy v. Waterfront Commission, 378 U.S. 52 (1964) (self-incrimination clause of Fifth Amendment).

Constitution forbids. Petitioner has twice been placed in jeopardy of life for the same offense.[8] This Court should grant certiorari to establish whether such a procedure violated the double jeopardy clause.

CONCLUSION

For the reasons shown, a writ of certiorari should issue to review the judgment and opinion of the Alabama Supreme Court.

Respectfully submitted,

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8. It is also disturbing that the Alabama Court of Criminal Appeals seems to rely upon aggravating circumstances rejected by the trial court in reviewing the imposition of a death sentence. Cf. Larry Gene Heath v. State, No. 4 Div. 134 slip op. at 4-5 (Ala. Crim. App. July 5, 1983); Ala. Code §13A-5-53 (b)(2) (1981). If this is true, it raises double jeopardy problems, cf. Arizona v. Rumsey, 104 S.Ct. 2305 (1984), and vindictiveness problems, cf. North Carolina v. Pearce, 395 U.S. 711 (1969).

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent

APPENDIX TO

PETITION FOR WRIT OF CERTIORARI TO

THE SUPREME COURT OF ALABAMA

APPENDIX A

Opinion of Alabama Supreme Court in
Ex Parte: Larry Gene Heath,
___ So.2d ___ (Ala. July 6, 1984)

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1984

Ex parte: Larry Gene Heath

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS

(Re: Larry Gene Heath

82-1060 v.

State of Alabama)

FAULKNER, JUSTICE.

The petitioner was convicted of murder during a kidnapping in violation of § 13A-5-40(a)(1), Code of Alabama, and was sentenced to die. The Court of Criminal Appeals reviewed the petitioner's conviction and, after independently determining that

the death penalty was appropriate, affirmed his conviction and sentence. Heath v. State, [4 Div. 134, July 5, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983). We granted certiorari pursuant to A.R.A.P. 39(c).

The facts are set out in detail in exhibit A to the opinion of the Court of Criminal Appeals. In short, Heath hired two men to abduct and murder his wife. After she was kidnapped and shot, her abductors abandoned her body in Georgia. Heath pleaded guilty to murder charges brought in Georgia and was sentenced to life in prison.

In his appeal to the Court of Criminal Appeals and in his petition to this Court, Heath raised only one issue, whether Alabama was prohibited by the double jeopardy provisions of the United States and the Alabama Constitutions from prosecuting Heath for his wife's murder after his murder conviction in Georgia arising out of the same incident. United States Constitution, Amendment V.; Alabama Constitution Art. 1, § 9.

We agree with the Court of Criminal Appeals that the Double Jeopardy Clause of the Fifth Amendment and the double jeopardy clause of the Alabama Constitution each applies only to offenses against the same sovereign and, therefore, that the subsequent prosecution in Alabama was not barred. Prosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense. United States v. Wheeler, 435 U.S. 313, 317 (1978). Thus, a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts on which the federal prosecution was based; nor does a prior state prosecution bar a federal one. Abbate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). As the Supreme Court stated in United States v. Walker, 435 U.S. at 320:

> "Bartkus and Abbate rest on the basic structure of our federal system, in which

the state of Georgia.

Alabama may choose not to prosecute individuals in situations like the one at bar where the defendant has been convicted of a serious offense and has received a substantial sentence in another state for an offense arising out of an act punishable under Alabama law. Such an exercise of prosecutorial restraint is not constitutionally mandated, however, and we decline to impose such a policy judicially under the guise of a constitutional pronouncement. See Booth v. State, 436 So. 2d 36 (Fla. 1983). Such a rule would have the undesirable effect of depriving Alabama of the right to enforce its own laws in instances where another state has prosecuted an individual for an offense arising out of the transaction in question, even where the prosecution in another state is for a relatively minor offense.

After reviewing the record and considering the petition, the arguments of the parties, and the opinion of the Court of Criminal Appeals, we are of the opinion that the judgment of the court below affirming the conviction and death sentence is due to be affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

APPENDIX B

Relevant Georgia and Alabama Statutory Provisions

Ga. Code Ann. §26-1101

[OCGA §16-5-1]

Murder; felony murder.

(a) A person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being.

Ga. Code Ann. §27-2528

[OCGA §17-10-32]

Sentence to life imprisonment or lesser punishment by judge on plea of guilty to an offense punishable by death

Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, sentence the person to life imprisonment or to any other punishment authorized by law for the offense named in the indictment; provided, however, that the judge must find one of the statutory aggravating circumstances provided in Code Section 17-10-30 before imposing the death penalty, except in cases of treason or aircraft hijacking. (Acts 1956, p. 737; 1973, pp. 159, 171).

Ga. Code Ann. 27-2534

[OCGA §17-10-30]

Procedure for imposition of death penalty generally.

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;

(3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the offense of murder for himself or another for the purpose of receiving money or another thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor, or former district attorney or solicitor was committed during or because of the exercise of his official duties;

(6) The offender caused or directed another to commit murder as an agent or employee of another person;

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict is a recommendation of a death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In nonjury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in subsection (b) of this Code section is so found, the death penalty shall not be imposed. (Code 1933, §27-2534.1, enacted by Ga. L. 1973, p. 159, §3).

Alabama Code §13-5-4(a)

Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosions;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

APPENDIX A

6 JUL

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

4 Div. 134

Larry Gene Heath

v

State

Appeal from Russell Circuit Court

BOWEN, PRESIDING JUDGE

In August of 1981, Rebecca McGuire Heath was nine months pregnant. In that same month, she was kidnapped from her home in Russell County, Alabama, and executed by a single gunshot wound to her head. Her body was discovered in Troup

County, Georgia. Her executioners had been hired by her husband, the defendant, for the sum of $2000.

The defendant was indicted for murder during a . . . kidnapping in the first degree in violation of Section 13A-5-40(a)(1), Code of Alabama 1975. At the guilt-finding phase of his trial, a jury found the defendant guilty as charged in the indictment. At the sentence-determining phase, the jury fixed the defendant's punishment at death. The trial judge then held the hearing mandated by Section 13A-5-47, found that the aggravating circumstance outweighed the mitigating circumstance and sentenced the defendant to death. The written findings of the trial court are attached to this opinion as Exhibit A. The trial and sentencing proceedings were conducted in accordance with Beck v. State, 396 So.2d 645 (Ala. 1981), and Beck v. Alabama, 447 U.S. 625 (1980). One issue is presented on appeal.

I

The defendant's sole contention on appeal is that his pleas of autrefois convict and former jeopardy were due to be granted. The defendant pled guilty to his wife's murder before the Superior Court of Troup County, Georgia, in February of 1982. He was sentenced to life imprisonment. The defendant argues that this prior Georgia conviction should have barred his subsequent trial and conviction in Alabama for the same criminal conduct.

The double jeopardy clauses of both the Fifth Amendment to the Constitution of the United States and Section 9, Art. I, of the Alabama Constitution, provide that no person shall "for the same offense" be twice put in jeopardy of life or limb. Consequently,

> "A plea of former jeopardy is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea. And this is true even if both cases are founded on the same facts but the crimes

charged were not the same in law."
Racine v. State, 291 Ala. 684, 687
286 So.2d 896 (1973).

The doctrine of dual sovereignty provides that, "in the absence of a statute, the rule against double jeopardy applies only to offenses against the same sovereignty." 22 C.J.S. Criminal Law, Section 296 (1961). Barnett v. State, 373 So.2d 1226 (Ala.Crim.App. 1979), cert. denied, 373 So.2d 1230 (Ala. 1980). The United States Supreme Court has recognized this doctrine in holding that a single act may constitute an offense against both state and federal governments [illegible] the offender may be prosecuted by both governments. [illegible]obate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). Also recognizing the principle that a person convicted in a state court may subsequently be prosecuted for the same act in federal court are United States v. Wheeler, 435 U.S. 313 (1978); Waller v. Florida, 397 U.S. 387 (1970), rehearing denied, 398 U.S. 914 (1970); United States v. NG, 699 F.2d 63 (2nd Cir. 1983); Pope v. [illegible]ne, 671 F.2d 298 (8th Cir. 1982), cert. denied, ____ U.S. ____, 102 S.Ct. 2974 (1982); Brown v. United States, 551 F.2d 619 (5th Cir. 1977).

We have been cited to no federal case involving jeopardy and multiple state prosecutions. However, the courts of various states have recognized that a single act may constitute offenses against two different states and therefore prosecution in both states is constitutionally permissible under the principle of dual sovereignty. People v. Walker, 177 Cal.Rptr. 147 (Dist.Ct.App. 1981); State v. Booth, 418 So.2d 385 (Fla.App. 1982); State v. Brown, 441 N.E.2d 1126 (Ohio App. 1981); State v. Straw, 626 S.W.2d 286 (Tenn.Crim.App. 1981); State v. Glover, 500 S.W.2d 271 (Mo. App. 1973).

In Hare v. State, 387 So.2d 299, 300 (Ala.Crim. App. 1980), this Court held that such dual prosecutions are permitted.

> "'A conviction in one state for an act in violation of its laws is not a bar to a prosecution in another for the same act, if it violates the laws of the latter state, unless it is otherwise provided by statute, or unless by compact between the states it has been agreed that the jurisdiction shall vest exclusively in the state first apprehending and arresting accused.' 22 C.J.S. Criminal Law, Section 296(c) (1961)."

In the absence of any statutory exception to the dual sovereignty doctrine, see Barnett, supra, we adhere to the principle stated in Hare, supra, and find no error in the denial of the defendant's pleas of former jeopardy.

II

We have fulfilled our statutory duty and searched the record for error affecting any substantial right of the defendant but have found none. Alabama Code Section 12-22-241 (1975); A.R.A.P. 45A.

We now review the propriety of the death sentence as required by Section 13A-5-53, Code of Alabama 1975. We have reviewed the sentencing proceedings and find therein no error adversely affecting the rights of the defendant. The trial court's finding of the aggravating and mitigating circumstances is supported by the evidence. The only aggravating circumstance relied on (the capital offense was committed while the defendant was an accomplice in the commission of a kidnapping, Section 13A-5-49(4)) was established by the verdict of conviction itself. This was proper under Section 13A-5-50, Code of Alabama 1975.

Explicitly addressing each of the three questions specified in Section 13A-5-53(b), we find that death is the proper sentence in this case.

(1) Under Section 13A-5-53(b)(1), there is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The trial court instructed the jury in its oral charge in the sentencing hearing not to let any sympathy, bias, passion, or prejudice affect their deliberations or sentence verdict. In the absence of any evidence to the contrary, we must assume

that the jurors followed these instructions. Marshall v. Lonberger, 51 U.S.L.W. 4113, 4116, n. 6 (U.S. February 22, 1983); Parker v. Randolph, 442 U.S. 62, 73 (1979).

(2) Our independent weighing of the aggravating and mitigating circumstances required by Section 13A-5-53(b)(2) indicates that death is the proper sentence. The record discloses the chronicle of a murder deliberately planned and engineered. The defendant overcame every obstacle in his path to insure the consummation of his wicked scheme. In consideration of the evidence presented, we do not see how the jury could have returned any verdict but that of guilty with a punishment of death.

In consideration of the third factor in determining whether the death sentence was proper, Section 13A-5-53(b)(3), we find that the sentence of death is neither excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See Williamson v. State, 370 So.2d 1054 (Ala.Crim.App. 1978), affirmed, 370 So.2d 1066 (Ala. 1979) vacated and remanded on other grounds, 448 U.S. 903 (1980).

In reviewing this factor, we have considered the punishments and convictions of the defendant's accomplices in the State of Georgia. Each accomplice was indicted for murder during kidnapping first degree. The defendant's girlfriend, Denise Paige Lambert,pled guilty to conspiracy to commit murder and was sentenced to ten years' imprisonment. Sanders Williams, who was hired to commit the murder but disappeared after several attempts "fell through", also pled guilty to conspiracy to commit murder and received a ten-year sentence.

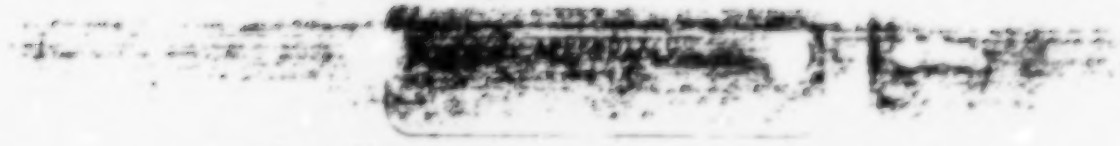
Jerry Heath, the defendant's brother, who allegedly furnished the defendant with the name of someone who would commit the murder, was tried and acquitted. The two hired

assassins, Charles Edward Owens and Gregory Hughes Lumpkin, were convicted of murder and received life sentences.

Our review of the entire record convinces us that the judgment of the circuit court is due to be and it is hereby affirmed.

AFFIRMED.

All Judges Concur.



Court of Criminal Appeals, No. 4th Div. 134 Russell County Circuit Court
Case No. C-82-392

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

Appellant

vs.

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

Larry W. Roney
Attorney at Law, P.C.
P. O. Box 128, 516 - 14th Street
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ATTORNEY FOR APPELLANT

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STATEMENT OF THE CASE

On April 29, 1982, a warrant for the arrest of the Appellant, Larry Gene Heath, was issued in Russell County, Alabama on a charge of Murder During Kidnapping First Degree of Rebecca McGuire Heath. During the Spring term, 1982 of the Russell County Grand Jury, the Appellant was indicted on a charge of Murder During Kidnapping First Degree of Rebecca Heath. On May 5, 1982, a Writ of Arrest was issued against the Appellant on a charge of Murder During Kidnapping First Degree. Appellant was returned from the State of Georgia where he was incarcerated, serving a life sentence from Troup County, Georgia for the murder of Rebecca Heath. On October 19, 1982, the Court appointed Counsel to represent the Appellant because of his indigent status and on October 20, 1982, the Appellant was arraigned and a plea of not guilty was entered. On November 2, 1982, a plea of autrefois convict and plea of former jeopardy was entered by Counsel for the Appellant by his Court appointed Counsel. On November 3, 1982, the Court set a hearing on the plea of former jeopardy and plea of autrefois convict. On November 4, 1982, a motion for Court to grant and approve expenses by defense attorneys, motion to obtain venue where impartial Jury can be obtained, plea to jurisdiction, and motion to suppress were filed by defense Counsel for the Appellant. On November 5, 1982, the Court set a hearing on the motion to suppress, plea to jurisdiction, motion for change of venue, and motion for approval of expenses of defense attorneys. On December 7, 1982 a Brief in support of plea of autrefois convict and plea of former jeopardy was filed by defense Counsel.

A hearing was held by the Court and the Court overruled and denied the plea of former jeopardy, and plea of autrefois convict and reserved

ruling on the plea of jurisdiction, motion to suppress and motion for change of venue until the trial of the case. The Court further set a final hearing on Appellant's motion for approval of expenses for December 21, 1982 and set the date for the trial on the indictment for the 10th day of January, 1983. On December 13, 1982, the Court amended its previous Order by reserving a ruling on the plea of jurisdiction until the close of the State of Alabama's case-in-chief in the trial of the case. On December 15, 1982, Appellant filed a motion to produce various evidence and documents to be used by the State of Alabama in the trial of the case. On December 16, 1982, the Court Ordered a hearing upon the motion to produce. On December 16, 1982, the Court authorized expenses for Court cost and the appointment of Counsel to file and represent the Appellant on a Petition For Writ of Habeas Corpus. On December 22, 1982, the Court Ordered the State of Alabama to provide a list of witnesses that it intended to have at the trial in this case and made rulings on other phases of the motion to produce and approval of expenses.

On December 28, 1982, Appellant filed a motion for continuance to allow Counsel for Appellant to prepare for hearing on the Petition For Writ of Habeas Corpus and in the event of an adverse ruling, to perfect an appeal to the Alabama Court of Criminal Appeals, prior to trial of this case which was set for January 10, 1983. On December 28, 1982, the motion for continuance of the trial of this case was overruled and denied by the Court. On January 3, 1983, the State of Alabama filed its answer to Order on the Defendant's motion to produce listing witnesses and exhibits to be used at trial.

On January 11, 1983, Appellant refiled his plea of autrefois convict,

plea of former jeopardy and brief in support of plea of autrefois convict and former jeopardy in open Court. Appellant was put to trial on the charge of Murder During Kidnapping First Degree of Rebecca Heath and on January 12, 1983, the Jury found the Appellar guilty of Murder During Kidnapping in the First Degree, as charged in the indictment and the Court Ordered a sentence hearing with participation by the Jury to be held on January 13, 1983. On January 13, 1983, the Jury determined that the one or more aggravating circumstances outweigh the mitigating circumstances, and recommended the punishment of the Appellant at death. On January 24, 1983, the Court Ordered that a pre-sentence investigation report be made on the Appellant and set a hearing on February 9, 1983 to take evidence on any part of the report and present arguments concerning the existence of aggravating and mitigating circumstances and the proper sentence to be imposed in this case. On February 2, 1983, the parole and probation officer filed a report of pre-sentence investigation. On February 10, 1983, the Court entered an Order of sentencing wherein the Appellant was sentenced to death by electrocution on the 17th day of March, 1983 and further suspended said sentence pending appeal.

On February 10, 1983 a death warrant was issued by the Clerk of the Circuit Court of Russell County, Alabama and the Court entered a determination of sentence by the Court setting forth findings of fact in the guilt phase of the trial and findings from the sentencing phase of the trial. On February 10, 1983, Appellant filed a notice of appeal to the Court of Criminal Appeals. On February 15, 1983, the Court Ordered that Counsel be appointed to represent the Appellant on appeal and suspended the sentence pending appeal.

STATEMENT OF THE ISSUES

I.

DID THE COURT ERR IN OVERRULING AND DENYING APPELLANT'S PLEA OF AUTREFOIS CONVICT AND PLEA OF FORMER JEOPARDY, THUS DEPRIVING APPELLANT OF HIS FIFTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, RIGHT OF THE ALABAMA CONSTITUTION?

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Green v. United States
Hare v. State
Baldwin v. State
Clark v. State
Burton v. State
North Carolina v. Pearce
Petite v. U.S.
Rinaldi v. U.S.
Missouri v. Hunter
U.S. Constitution, Fifth Amendment
Alabama Constitution, Article I, Section Nine
Title 13A, Section 13A-5-40(a)(1) Code of Alabama, 1975
Title 13A, Section 13A-5-41 Code of Alabama, 1975
Title 13A, Section 13A-6-2(a) Code of Alabama, 1975

STATEMENT OF THE FACTS

Rule 28 of the Alabama Rules of Appellate procedure provides, in pertinent part, that "[t]he brief of the Appellant shall contain ... [a] full statement of the facts relevant to the issues presented for review...". Compliance with the foregoing statutory requirement mandates review and analysis of Trial Court's conduct, inasmuch as the sole issue presented herein is the denial by the Trial Court of the Appellant's plea of autrefois convict and plea of former jeopardy in violation of Appellant's constitutional rights prohibiting double jeopardy. Thus the facts constituting the offense of which the Appellant was convicted are of marginal significance only to the extent that they enable the Court to assess the error committed by the Trial Court.

In the case Sub Judice, the Appellant has been subjected to double punishment for the murder of his wife, Rebecca Heath, in violation of his constitutional rights prohibiting double jeopardy.

Larry Gene Heath was indicted at the November, 1981 term of the Grand Jury of the Superior Court of Troup County, Georgia for the murder of his wife, Rebecca Heath, and was put to trial on said charge of murder.

On the 10th day of February, 1982, after negotiations between Counsel for the Appellant and the District Attorney of Troup County, Georgia, Larry Gene Heath entered a plea of guilty to the charge of murder of his wife, Rebecca Heath and was sentenced to life imprisonment. (R-735-754)

At the Spring Term, 1982, of the Grand Jury of the Circuit Court of Russell County, Alabama, Larry Gene Heath was indicted for murder during kidnapping first degree, of his wife, Rebecca Heath. (R-728-729)

Larry Gene Heath filed a plea of autrefois convict and a plea of former jeopardy on November 2, 1982. (R-735-754)

On December 7, 1982, Appellant filed a brief in support of plea of autrefois convict and plea of former jeopardy. (R-769-773)

On December 10, 1982, the Trial Court overruled and denied the plea of autrefois convict and the plea of former jeopardy. (R-774-777)

On January 10, 1983, Appellant was put to trial on the charge of Murder During Kidnapping First Degree of his wife, Rebecca Heath and on January 12, 1983, the Appellant was found guilty of Murder During Kidnapping First Degree. (R-81v)

On January 13, 1983, the Jury found that the aggravating circumstances out-cighed the mitigating circumstances and recommended the punishment of the Appellant at death. (R-821)

A pre-sentence hearing was held by the Trial Court on February 9, 1983 and on February 10, 1983, the Trial Court found that the aggravating circumstances outweighed the mitigating circumstances and sentenced the Appellant to death by electrocution on the 17th day of March, 1983 and suspended said sentence pending appeal. (R-834-845)

On February 10, 1983, the Appellant filed a notice of appeal to the Court of Criminal Appeals.

[redacted]

ARGUMENT

THE TRIAL COURT DID ERR IN OVERRULING AND DENYING APPELLANT'S PLEA OF AUTREFOIS CONVICT AND PLEA OF FORMER JEOPARDY, THUS DEPRIVING APPELLANT OF HIS FIFTH AMENDMENT RIGHT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 9, RIGHT OF THE ALABAMA CONSTITUTION.

The indictment by the Russell County, Alabama Grand Jury charges the Appellant with Murder During Kidnapping First Degree in violation of Title 13A, Section 13A-5-40(a)(1) Code of Alabama, 1975 which states that:

"The following are capital offenses: (a)(1) Murder by the Defendant during a kidnapping in the first degree or an attempt thereof committed by the Defendant".

Title 13A, Section 13A-5-41 provides that subject to 13A-1-9-(b) the Jury may find a Defendant indicted for a crime defined in Section 13A-5-40 (a) not guilty of the capital offense but guilty of a lesser included offense or offenses. Lesser included offenses shall be defined as provided in Section 13A-1-9(a), and when there is a rational basis for such a verdict includes but are not limited to murder as defined in Section 13A-6-2(a), and accompanying other felony, if any, in the provisions Section 13A-5-40(a) upon which the indictment is based.

Murder is defined in Title 13A, Section 13A-6-2(a) as follows:

"A person commits the crime of murder if:

(3) He commits or attempts to commit kidnapping in the first degree. and, in the course of and in furtherance of the crime that he is committing or attempting to commit or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(c) Murder is punishable by imprisonment in the penitentiary for not less than ten years to life; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by Article II of Chapter 5 of this Title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by Article II of Chapter 5 of this Title or any amendment thereto."

The Appellant contends that murder is a lesser included offense of murder during kidnapping first degree under the laws of the State of Alabama and also, that the offense of murder is a lesser included offense of murder caused and directed by the Appellant under the laws of the State of Georgia.

Appellant further contends that his constitutional rights were violated when the State of Alabama prosecuted him for murder during kidnapping first degree of his wife, Rebecca Heath, after he had been prosecuted and convicted and sentenced to life imprisonment for murder caused and directed by the Appellant under the laws of the State of Georgia in the case which was completed in Troup County, Georgia Superior Court on February 10, 1982. The State standard or test for double jeopardy is clearly set out in the case of Baldwin v. State 47 Ala. App. 136, 251 So.2d. 633 (1971) wherein the Court said:

"The established test of which a plea of former jeopardy must be subjected is, whether the facts averred in the second indictment, if found to be true, would have warranted a conviction upon the first indictment. In other words, in determining whether both indictments charge the same offense, the test generally applied is that when the facts necessary to convict on the second prosecution would necessarily have convicted on the first, a final judgment on the first prosecution will be a bar to the second.

If the minor offense is embraced within the major one, as a constituent element or component part of it, and on the trial of the one there can be a conviction of the other, then a former conviction or acquittal of the minor will bar the major."

Under State law in the case of Clark v. State, 294 Ala. 485, 318 So. 2d. 805 (1974) Cert. denied, 423 U.S. 937, 96 S. Ct. 298, 46 L. Ed. 2d. 270 (1975), the Court said:

"When one is tried under an indictment charging murder in the first degree, and is found guilty of a lesser included homicide, such findings is an acquittal of murder in the first degree, and such acquittal may be pleaded as a bar to the higher charge of murder in the first

degree in the event of a second trial on the indictment, if the Defendant so desires."

In the case of Burton v. State, 115 Ala. 1, 22 So. 585 (1897), the Court said:

"A conviction of manslaughter is an acquittal of murder based upon the same evidence."

The Court further said in Baldwin v. State, that:

"A series of criminal charges cannot be based on the same offense or criminal act, at least, as concerns the dignity of the same sovereignty."

"A prosecution for any part of a single crime bars any further prosecutions based upon the whole or a part of the same crime."

"If the State elects, through its authorized officers, to prosecute a crime in one of its phases, or aspects, it cannot afterwards prosecute the same criminal act under color of another name."

Under Article I, Section 9, of the Alabama Constitution, double jeopardy is prohibited. The double jeopardy issue arose in the case of Hare v. State, 387 So.2d. 299 (1980), wherein the Court of Criminal Appeals of Alabama held:

"That conviction of Defendant of burglary in Tennessee would not, on theory former jeopardy, prevent him from being tried or convicted for possession of controlled substances in Alabama, even if he obtained the substances in the burglary."

The Court further says:

"Even if the Defendant proved the allegations of his plea, the conviction of burglary in Tennessee would not prevent the Defendant's trial or conviction for possession of controlled substances in Alabama. These crimes are not the same in law in fact and therefore will not support a plea of former jeopardy."..... Moreover, even if the crimes where the same,

"A conviction in one State for an act in violation of its laws is not a bar to a prosecution in another State for the same act, if it violates the laws of the latter state, unless it is otherwise provided by statute, or unless by compact between the States it has been agreed that jurisdiction shall vest exclusively in the State first apprehending and arresting accused."

Appellant contends that the decision of Hare v. State, clearly abolishes the protection afforded by the Fifth Amendment of the U.S. Constitution and Article I, Section 9, of the Alabama Constitution which prohibits double jeopardy prosecutions and the Hare case should be reversed.

The United States Supreme Court set forth the nature of the guarantee against double joepardy, in the case of Benton v. Maryland, 395 U.S. 784, 23 L.E.D. 2d. 707, 89 S. Ct. 2056 (1969) wherein the Court said:

"The fundamental nature of the guarantee against double jeopardy can hardly be doubted. Its origins can be traced to Greek and Roman times, and it became established in the common law of England long before this nation's independence. See Bartkus v. Illinois, 359 U.S. 121, 151-155, 3 L. E.D. 2d. 684, 705-707, 79 S. Ct. 676 (1959) (Black J. dessenting). As with many other elements of the common law, it was carried into the jurisprudence of this country through the medium of Blackstone, who codified the doctrine in his commentaries. "The plea of autrefois acquit, or a former acquittal," he wrote, "is grounded on this universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." Today, every state incorporates some form of prohibition in its constitution or common law. As this Court put it in Green v. United States, 355 U.S. 184, 187-188, 2 L. E.D. 2d. 199, 204, 78 S. Ct. 221, 61 A. L. R. 2d. 1119 (1957), "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and powers should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as inhancing the possibility that even though innocent he may be found guilty." This underlying notion has from the very beginning been part of our constitutional tradition. Like the right to trial by jury, it is clearly "fundamental to the American scheme of justice."

Further, in the case of Benton v. Maryland, the Supreme Court, held:

"That the double jeopardy clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment."

Further, Article I, Section 9 of the Alabama Constitution prohibits double jeopardy prosecutions by the State of Alabama.

As articulated in North Carolina v. Pearce, 395 U.S. 711 (1969), the double jeopardy prohibition secures at least three interests.

"It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." Id. at 717

Allowing either a State or the Federal government to prosecute an individual after the other jurisdiction has tried him for the same act appears to infringe these three concerns which the double jeopardy clause is designated to protect. Under the theory of dual sovereignty, successive Federal and State prosecutions have been permitted, however, double jeopardy law may have changed since the decision of Bartkus v. Illinois, in which the Supreme Court found no double jeopardy problems with successive Federal and State prosecutions for the same act. The change was noted in the case of Benton v. Maryland, wherein the Court made it clear that the double jeopardy does bind the State.

While the Supreme Court has not overturned Bartkus v. Illinois, the Supreme Court has acknowledged the inherent unfairness of needless multiple prosecutions. Shortly after Bartkus v. Illinois, the Attorney General adopted a Federal policy which barred a Federal trial following a State prosecution for the same acts "unless the reasons are coupelling." This policy was recognized by the Court and Petite v. U.S., 361 U.S. 526, (1960) See also Rinaldi v. U.S., 434 U.S. 22, (1977). It is noteworthy, that the State of New Jersey has also adopted a similar provision, "Former prosecution in another jurisdiction: when a bar" L. 1978 C. 95, Section 2C: 1-11. Criminal Law Reporter Volume 28 October, 1980, March 1981.

In the case of Missouri v. Hunter, 103 S. Ct. 673 (1983) Justice Marshall, with whom Justice Stevens joined in a dessenting opinion made the following observations with regard to double jeopardy prosecutions, to-wit:

"A state has wide latitude to define crimes and to prescribe the punishment for a given crime. For example, a State is free to prescribe two different punishments (e.g., a fine and a prison term) for a single offense. But the Constitution does not permit a state to punish as two crimes conduct that constitutes only one "offence" within the meaning of the double jeopardy clause. For whenever a person is subjected to the risk that he will be convicted of a crime under State law, he is "put in jeopardy of life or limb." If the prohibition against being "twice put in jeopardy" for the "same offence" is to have any real meaning, a state cannot be allowed to convict a defendant two, three, or more times simply by enacting separate statutory provisions defining nominally destinct crimes. If the double jeopardy clause imposed no restrictions on a legislature's power to authorize multiple punishment, there would be no limit to the number of convictions that a state could obtain on the basis of the same act, state of mind, and result. A state would be free to create substantively identicle crimes differing only in name, or to create a series of greater and lesser-included offenses, with the first crime a lesser-included offense of the second, the second a lesser-included offense of the third, and so on."

The Supreme Court states further in the case of Missouri v. Hunter, that:

"The double jeopardy clause forbids either multiple prosecutions or multiple punishment for "the same offence". "Respondent in Missouri v. Hunter, case was convicted of both armed criminal action and the lesser-included offense of first-degree robbery, and he was sentenced for both crimes. Had respondent been tried for these two crimes in separate trials, he would plainly have been subjected to multiple prosecutions for "the same offence" in violation of the double jeopardy clause."

In the instant case, the Appellant was clearly put to trial on the charge of murder of his wife, Rebecca McGuire Heath and that said murder was caused and directed by Appellant in the Superior Court of Troup County, Georgia and a conviction was had by a plea of guilty to the lesser-included offense of murder of Rebecca Heath. The Appellant was also tried and convicted in the Circuit Court of Russell County, Alabama on the charge of Murder During Kidnapping First Degree of his wife, Rebecca Heath and received the death penalty. Both cases were the same in fact and law. Therefore, pursuant to prohibitions against Double Jeopardy as provided by the Fifth Amendment of the United States Constitution and Article I, Section 9 of the Constitution of Alabama, the conviction of the Appellant in the Circuit Court of Russell County, Ala-

bums should be reversed.

CONCLUSION

The Appellant is an indigent and represented by Court appointed Counsel. Appellant was put to trial in the Circuit Court of Russell County, Alabama on a charge of Murder During Kidnapping First Degree of his wife, Rebecca Heath after having been convicted on a charge of Murder and that he directed said murder of his wife, Rebecca Heath, in the Superior Court of Troup County, Georgia. The trial of the Appellant by the Circuit Court of Russell County, Alabama clearly violates the prohibition against Double Jeopardy as set forth in the United States Constitution and the Constitution of Alabama. Therefore, after considering the facts, law, and the argument of Appellant, this case should be reversed.

Further, the Appellant requests the Court to review the record for any other violations of Appellant's rights, pursuant to Beck v. State, 396 So.2d. 645 (1980-1981) and Loper v. State, 415 So.2d. 1204 (1982).

Respectfully submitted,

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

By: _____

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CERTIFICATE OF SERVICE

I, hereby certify that on this the 31st day of March, 1983, I served a copy of the foregoing Brief and Argument on Honorable Charles Graddick, Attorney General, State of Alabama, 250, Administrative Building, Montgomery, Alabama 36130, by mailing said copy to him postage prepaid and properly addressed.

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

BY: Larry W. Roney

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[redacted] APPENDIX [redacted]

FOURTH DIVISION

NUMBER 134

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

Appellant

vs.

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

APPLICATION FOR REHEARING

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FOURTH DIVISION NUMBER 134

IN THE COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

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vs

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

APPLICATION FOR REHEARING

Comes now the Defendant, Larry Gene Heath, Appellant in the above styled cause, by and through his Attorney of Record, and moves this Honorable Court to render unto it a rehearing in said cause and to set aside, annul, and hold for naught the judgment of the Circuit Court of Russell County, Alabama. Brief and Argument in Support thereof are submitted.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

[redacted]

FOURTH DIVISION NUMBER 134

IN THE CIRCUIT COURT OF CRIMINAL APPEALS OF ALABAMA

LARRY GENE HEATH,

Appellant

vs

STATE OF ALABAMA,

Appellee

APPEALED FROM THE CIRCUIT COURT OF

RUSSELL COUNTY, ALABAMA

BRIEF AND ARGUMENT OF APPELLANT

IN SUPPORT OF APPLICATION FOR REHEARING

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ATTORNEY FOR APPELLANT

[redacted]

BRIEF AND ARGUMENT

THE RECORD AND THE OPINION OF THE COURT AFFIRMATIVELY SHOWS THAT THE COURT FAILED TO ADDRESS THE ISSUE AS TO WHETHER OR NOT THE APPELLANT'S CONSTITUTIONAL RIGHTS GUARANTEED UNDER THE UNITED STATES CONSTITUTION WERE VIOLATED BY PROSECUTION BY THE STATE OF ALABAMA FOR THE SAME OFFENSE WHICH IS PRECISELY THE SAME IN LAW AND FACT AS THE FORMER ONE RELIED ON UNDER APPELLANT'S PLEA OF AUTREFOLIS CONVICT AND PLEA OF FORMER JEOPARDY.

In the opinion of the Court rendered on July 5, 1983, the Court failed to address the issue as to whether or not the Appellant was tried and convicted of the offense under the laws of the State of Alabama, which are precisely the same in law and fact as the offense charged against the Appellant in the State of Georgia.

As the Court pointed out on Page 3 of its opinion, there were no cited cases to any Federal case law involving jeopardy in multiple State prosecution and because there were no Federal cases cited, the Court apparently ignored the law relative to multiple prosecutions for an offense, which are precisely the same in law and fact.

Apparently the Court relied on the case of Hare V. State, 367 So. 2 d 299, 300 (Ala. Crim. App. 1980), in reaching its decision in this case. The Hare Case can be distinguished simply by looking at the facts in the Hare Case, wherein the Court in Tennessee was dealing with the offense of a burglary in the State of Tennessee and the Court was dealing with the offense of possession of drugs in the State of Alabama, which are not precisely the same in law and fact.

In the instant case, the Appellant was convicted of the offense of murder during kidnapping first degree in the State of Alabama and was convicted of murder, which was a lesser included offense of the charge of murder caused and directed by the Appellant under the laws of the State of Georgia.

CONCLUSION

Appellant contends that double punishment has been imposed for the same offense which is precisely the same in law and fact and that his Constitutional Rights guaranteed under the Fifth Amendment of the United States Constitution and his Constitutional Rights guaranteed by Article I Section 9, of the Alabama Constitution have been violated. Further, Appellant contends that he relied upon his guaranteed Constitutional Rights as set forth above in pleading guilty to a lesser included offense of murder of his wife in the State of Georgia, wherein he was sentenced to life imprisonment.

The Court ignored the prohibition of multiple prosecutions for the same offense, which are precisely the same in law and fact, in reaching its decision. To allow the conviction in the State of Alabama to stand renders the Fifth Amendment of the United States Constitution null and void.

Therefore, the application for rehearing should be granted.

Respectfully submitted,

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ATTORNEY FOR APPELLANT

[redacted]

CERTIFICATE OF SERVICE

I, hereby certify that on this the 6th day of July, 1983, I served a copy of the foregoing Application For Rehearing and Brief and Argument in Support thereof on Honorable Charles Graddick, Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama 36130 by mailing said copy to him postage prepaid and properly addressed.

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Phenix City, Alabama 36867-0002
ATTORNEY FOR APPELLANT

EXHIBIT A

STATE OF ALABAM.	)	IN TH_ CIRCUIT COURT OF
	)	
Plaintiff	)	RUSSELL COUNTY, ALABAMA
	)	
vs.	)	CRIMINAL ACTION NO. CC 82-392
	)	
LARRY GENE HEATH,	)	
	)	
Defendant	)	

DETERMINATION OF SENTENCE BY THE COURT

The defendant herein, with assistance of counsel at all proceedings, was found guilty as charged in the indictment. Thereafter a sentence hearing with participation by the same jury as at trial was held. Pursuant to Section 13A-5-47, Code of Alabama 1975, the Court makes the following findings of fact summarizing the crime herein and the defendant's participation in the crime:

FINDINGS OF FACT
GUILT PHASE

In early August, 1982 defendant contacted his brother, Jerry Heath, and Jerry Heath set up a meeting at which he, defendant, and Ricky Heath, another brother of defendant, discussed defendant's intentions to kill his wife, Rebecca Heath. Defendant gave Ricky Heath $40.00 for his expenses toward accomplishing that result; however, nothing developed from this meeting.

Defendant thereupon contacted Jerry Heath a second time. Jerry Heath told defendant he knew somebody else that might commit the murder. Subsequently Jerry Heath told defendant to meet a person at an apartment in Columbus, Georgia. This person was Charles Edward Owens. Sometime later Owens and two other men, Gregory Hughes

Lumpkin and Sande.. Williams, went to defenda..'s place of employment. There defendant discussed with Williams the details of his plans. Defendant wanted the homicide to appear to be an accident. Defendant paid Williams $100.00 as a down payment. Later that day defendant wen to Owens' apartment and gave a pistol to Williams. Defendant planned for Williams to force his way into Rebecca Heath's car while she took defendant to work. Williams was then to kill Rebecca Heath and make her death appear to be accidental. The next day defendant gave Owens another $300.00, so that they could obtain an automobile to carry out t.e plan.

Nothing materailized from this plan, and several days later Owens told defendant Williams had left and his whereabouts were unknown. Owens stated to defendant that he and his partner, Gregory Hughes Lumpkin, would do the job for defendant. Approximately two days later, on August 31, 1981, at about 2:00 A. M., Owens called defendan at defendant's home and said that he and Lumpkin were prepared for th job. At 6:00 A. M. defendant locked and left his house. Before leaving he put a brick in his car which was also used by his wife. The brick was to be placed on the accelerator in carrying out the appearances of an accident. He also left a piece of wiring in the car to tie down the steering wheel.

Defendant went to Owens' apartment and explained how he wanted the act done. Defendant then went to the apartment of his girl-friend, Denise Lambert, and waited for a call from Owens. After receiving the call, defendant went to a service station in Columbus,

Georgia, and turned over his automobile, a 19[illegible] green Oldsmobile, to Lumpkin. Owens was also present, driving a white Mustang.

Defendant and Denise Lambert, driving Lambert's truck, led Owens and Lumpkin to Russell County, Alabama. On the road leading to his house, defendant stopped and pointed out the house to Lumpkin. Defendant then left as Owens pulled up beside Lumpkin. Defendant had left his house keys on the key ring with his car keys, so that Lumpkin had the keys to the house. The evidence indicates that Rebecca Heath was in her home when defendant pointed out his house to Owens and Lumpkin. At 9:10 A. M. that same morning defendant's car was seen a short distance off the road known as Smokey Road in Troup County, Georgia. A light-colored Mustang was seen sideways in the road one hundred yards from defendant's automobile. It then went down the road at a high rate of speed.

The body of Rebecca Heath was found at approximately 11:00 A. M. She was dead, having suffered a fatal gunshot wound through the right eye and into the brain. She was nine months pregnant.

In August, 1981 defendant borrowed $2,500.00 from Southern Disco Company. Rebecca Heath was a cosigner of this loan. $500.00 of this loan was used by defendant to build concrete pads for his dog pen. Thereafter defendant formed the intention to use the balance of $2,000.00 to pay for the murder of his wife. This sum of money was used for that purpose.

Rebecca Heath was forcibly abducted from her home in Russell County, Alabama, for the purpose of inflicting sufficient physical

injury to her to use her death. There is no evidence to suggest that at any time she was armed with any weapon. There is no evidence to indicate that the killing of Rebecca Heath was a justifiable or excusable homicide.

Defendant states that he formed the intention and plan to murder his wife because he was under the influence of extreme mental and emotional disturbance based upon his belief that his wife was engaged in an extramarital affair with another man and was pregnant by that man

The Court finds that defendant initiated, procured, aided and abetted, and planned the abduction of Rebecca Heath so that she could be murdered. Defendant intentionally hired others with whom he was acting in complicity to intentionally abduct Rebecca Heath and to intentionally murder the said Rebecca Heath.

FINDINGS FROM SENTENCING PHASE

After the trial a sentence hearing was conducted with participation by the jury. The state rested upon the evidence brought forth at trial. The defendant presented evidence by witnesses called to testify. Arguments were made to the jury by both sides. The jury deliberated after being charged by the Court and unanimously returned a recommendation that defendant's punishment be death.

The Court ordered the probation officer for this circuit to prepare a written presentence investigation report. This report was duly prepared and filed. Copies of the same were furnished to counsel for both parties. A hearing was held for the parties to respond to the report and to present evidence about any part of the report which

would be the subject of a factual dispute. At this hearing the state presented no further evidence. The defendant testified and gave evidence disputing certain matters in the presentence investigation report. The defendant also stated that he did have remorse for the killing of his wife, Rebecca Heath.

The Court finds from the evidence presented in this case that the defendant was guilty and is guilty of the murder of Rebecca Heath during a kidnapping in the first degree of the said Rebecca Heath.

The Court finds the following aggravating circumstance to exist in this case: The capital offense was committed while the defendant was engaged in the commission of a kidnapping.

The Court finds that the following aggravating circumstances do not exist in this case:

A. The capital offense was committed by a person under sentence of imprisonment.

B. The defendant was previously convicted of another capital felony or a felony involving the use of threat of violence to the pers

C. The defendant knowingly created a great risk of death to many persons.

D. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

E. The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, or burglary.

F. The capital offence was committed for pecuniary gain.

G. The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

H. The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.

Upon consideration of all of the evidence brought forth at the trial in this case, the sentence hearings, and the presentence investigation report, the Court finds that the following mitigating circumstance exists in this case: Defendant was convicted of the murder of Rebecca Heath in the Superior Court of Troup County, Georgi on February 10, 1982, and received a sentence of life imprisonment in that court.

The Court finds that the following mitigating circumstances do not exist in this case:

A. The defendant has no significant history of prior criminal activity. The Court finds that the defendant does have a significant history of prior criminal activity in that before the sentence hearin in this case he was convicted of three felony offenses, those being buying, receiving or concealing stolen property, forgery, and a crimi attempt of theft by extortion.

B. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

C. The victim was a participant in the defendant's conduct or consented to it.

D. The defendant was an accomplice in the capital offense

committed by another person and his participation was relatively mino

E. The defendant acted under extreme duress or under the substantial domination of another person.

F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired.

G. The age of the defendant at the time of the crime.

H. Any other mitigating circumstances offered pursuant to Section 13A-5-52, Code of Alabama 1975.

Upon considering and weighing the aggravating circumstance with the mitigating circumstances in this case, the Court is of the opinion that the aggravating circumstance outweighs any mitigating circumstances. It is, therefore,

ORDERED AND ADJUDGED BY THE COURT that the defendant be sentence to death by electrocution as specified in the laws of this state and as set forth in an order of sentence by this Court.

DONE this the 10th day of February, 1983.

Wayne J. Dawson
Circuit Judge

STATE OF ALABAMA,	)	IN THE CIRCUIT COURT
	)	
Plaintiff	)	RUSSELL COUNTY, ALABAMA
	)	
vs.	)	CRIMINAL ACTION NO. CC 82-392
	)	
LARRY GENE HEATH,	)	
	)	
Defendant	)	

ORDER OF SENTENCING

This case is now before the Court for sentencing. The State is represented by its district attorney and the defendant is present in open court with his counsel, Larry W. Roney, Esq., and R. Michael Raiford, Esq. The Court has previously conducted a sentence hearing with participation by the jury and a hearing for the parties to present evidence regarding matters in the contents of the presentence report and for arguments to be made regarding the proper sentence in this case. The defendant, Larry Gene Heath, being asked by the Court if he has anything to say as to why the sentence of the Court should not be pronounced or before sentence is pronounced says proceedings violate the 5th Amendment and laws of this state.

Upon jury verdict of guilty of murder during kidnapping in the first degree, the Court adjudges the defendant guilty of murder during kidnapping in the first degree, that is, that Larry Gene Heath did intentionally cause the death of Rebecca Heath by shooting her with a pistol, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or

attempt to abduct, Rebecca Heath, with the intent to inflict physical injury upon her, in violation of Section 13A-5-40(a)(1) of the Code of Alabama 1975, as amended. Upon consideration of the evidence in this case, the matters brought forth in the sentence hearing, and upon consideration of the aggravating and mitigating circumstances in this case, the Court finds that the aggravating circumstance outweighs any mitigating circumstances.

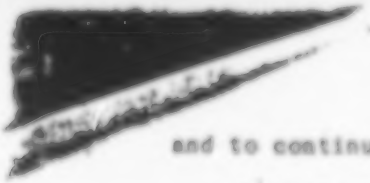
It is, therefore,

ORDERED BY THE COURT that the punishment in this case is fixed at death.

IT IS ORDERED BY THE COURT that the defendant, Larry Gene Heath, be sentenced to death by electrocution on the 17th day of March, 1983.

The Sheriff of Russell County, Alabama, shall deliver the said Larry Gene Heath to the custody of the Warden of the William C. Holman unit of the state prison system at Atmore, Alabama, together with a warrant from the clerk of this court as set forth hereafter.

The executioner designated by the laws of this state, at the proper place specified by law for the execution of one sentenced to death, shall cause a current of electricity of sufficient intensity to cause death to pass through the body of the defendant, with such current of electricity to be applied



and to continue until the defendant, Larry Gene Heath, is dead.

The clerk of this court is ordered to issue a warrant under the Seal of this Court directed to the warden of William C. Holman unit of the state prison system at Atmore, Alabama, for the execution of the sentence of death, which warrant shall recite the fact of conviction and shall set forth specifically the offense, the judgment of the Court, and the time fixed for defendant's execution. Said warrant shall command the warden to proceed at the time and place named in the sentence to carry the same into execution as provided in Section 15-18-82, Code of Alabama 1975. The clerk shall deliver said warrant to the Sheriff of Russell County, Alabama, who shall deliver the same, together with the defendant, Larry Gene Heath, to said warden.

Pursuant to Section 13A-5-55, the judgment of conviction is subject to automatic review. Notice of appeal is entered and the sentence herein is suspended, pending appeal.

DONE this the 10th day of February, 1983.

Wayne J. Dobson
Circuit Judge

APPENDIX B

FILED

JUL 6 1984

CLERK
SUPREME COURT OF ALABAMA

THE STATE OF ALABAMA - - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

SPECIAL TERM, 1984

Ex parte: Larry Gene Heath

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS

(Re: Larry Gene Heath

82-1060 v.

State of Alabama)

FAULKNER, JUSTICE.

The petitioner was convicted of murder during a kidnapping in violation of § 13A-5-40(a)(1), [illegible] of Alabama, and was sentenced to die. The Court of Criminal Appeals reviewed the petitioner's conviction and, after independently determining that

the death penalty was appropriate, affirmed his conviction and sentence. Heath v. State, [4 Div. 134, July 5, 1983] ___ So. 2d ___ (Ala. Crim. App. 1983). We granted certiorari pursuant to A.R.A.P. 39(c).

The facts are set out in detail in exhibit A to the opinion of the Court of Criminal Appeals. In short, Heath hired two men to abduct and murder his wife. After she was kidnapped and shot, her abductors abandoned her body in Georgia. Heath pleaded guilty to murder charges brought in Georgia and was sentenced to life in prison.

In his appeal to the Court of Criminal Appeals and in his petition to this Court, Heath raised only one issue, whether Alabama was prohibited by the double jeopardy provisions of the United States and the Alabama Constitutions from prosecuting Heath for his wife's murder after his murder conviction in Georgia arising out of the same incident. United States Constitution, Amendment V.; Alabama Constitution Art. 1, § 9.

We agree with the Court of Criminal Appeals that the Double Jeopardy Clause of the Fifth Amendment and the double jeopardy clause of the Alabama Constitution each applies only to offenses against the same sovereign and, therefore, that the subsequent prosecution in Alabama was not barred. Prosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense. United States v. Wheeler, 435 U.S. 313, 317 (1978). Thus, a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts on which the federal prosecution was based; nor does a prior state prosecution bar a federal one. Abate v. United States, 359 U.S. 187 (1959); Bartkus v. Illinois, 359 U.S. 121 (1959). As the Supreme Court stated in United States v. Wheeler, 435 U.S. at 320:

> "Bartkus and Abbate rest on the basic structure of our federal system, in which

> States and the National Government are separate political communities. State and Federal Governments '[derive] power from different sources,' each from the organic law that established it. United States v. Lanza, 260 U.S. 377, 382. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.' Ibid. And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power."

The Supreme Court has never considered the question of the applicability, vel non, of the "dual sovereignty" doctrine to consecutive prosecution by two states. It is clear that the "dual sovereignty" concept does not apply in every instance where successive cases are brought by separate entities. For instance, a state and a municipal subdivision of the same state cannot bring successive prosecutions for offenses arising out of the same conduct. Waller v. Florida, 397 U.S. 387 (1970). The states of Alabama and Georgia are clearly separate political sovereignties. However, if, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-a-vis the federal government then surely it is a sovereign entity vis-a-vis

the state of Georgia.

Alabama may choose not to prosecute individuals in situations like the one at bar where the defendant has been convicted of a serious offense and has received a substantial sentence in another state for an offense arising out of an act punishable under Alabama law. Such an exercise of prosecutorial restraint is not constitutionally mandated, however, and we decline to impose such a policy judicially under the guise of a constitutional pronouncement. See Booth v. State, 436 So. 2d 36 (Fla. 1983). Such a rule would have the undesirable effect of depriving Alabama of the right to enforce its own laws in instances where another state has prosecuted an individual for an offense arising out of the transaction in question, even where the prosecution in another state is for a relatively minor offense.

After reviewing the record and considering the petition, the arguments of the parties, and the opinion of the Court of Criminal Appeals, we are of the opinion that the judgment of the court below affirming the conviction and death sentence is due to be affirmed.

AFFIRMED.

Torbert, C.J., Maddox, Jones, Almon, Shores, Embry, Beatty, and Adams, JJ., concur.

APPENDIX E

FOURTH DIVISION

NUMBER 134

IN THE SUPREME COURT OF ALABAMA

LARRY GENE HEATH

[APPELLANT] PETITIONER

VS

STATE OF ALABAMA,

[APPELLEE] RESPONDENT

APPEALED FROM THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL
APPEALS OF ALABAMA

LARRY GENE HEATH

VS

STATE OF ALABAMA

CIRCUIT COURT OF RUSSELL COUNTY

SUP. CT. NO. _____

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF
CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA.

Comes now the Petitioner, Larry Gene Heath, by and through his attorney of record, and respectfully petitions this Honorable Court to review and to reverse the decision and judgment of the Court of Criminal Appeals of Alabama rendered in the above styled cause on July 5, 1983, affirming the judgment of conviction had in the Circuit Court of Russell County, Alabama.

Petitioner avers that he has duly filed an Application For Rehearing in the Court of Criminal Appeals of Alabama in this cause within the time required by law, raising the points hereinafter set forth, and that said Application For Rehearing was overruled on August 2, 1983.

As grounds for this Petition For Writ of Certiorari to the Court of Criminal Appeals the Petitioner sets forth and assigns the following, separately and severally:

The basis of this Petition For Writ of Certiorari is as follows:
The Court of Criminal Appeals affirmed the judgment of conviction had in the Circuit Court of Russell County, Alabama, when in fact the record affirmatively shows that Petitioner was convicted in the State of Georgia and in the State of Alabama for the same offense, which is percisely the same in law and fact and that a decision is needed by this Court as to whether or not the prosecution in the State of Alabama constituted double jeopardy in violation of the 5th Amendment of the United States Constitution.

WHEREFORE, THESE PREMISES CONSIDERED, Petitioner urges that a Writ of Certiorari be issued from this Court to the Court of Criminal Appeals and that this Court proceed to review and correct the errors complained of and to reverse the judgment of the Court of Criminal Appeals affirming the judgment of conviction had in the Circuit Court of Russell County, Alabama and render such judgment as said Court should have rendered in addition to such other relief as Petitioner may be entitled.

Respectfully submitted,

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

BY: Larry W. Roney

Larry W. Roney
Post Office Box 128
Phenix City, Alabama 36867-0002
ATTORNEY FOR PETITIONER

* *

I hereby certify that on this the 10th day of August, 1983. I have served a copy of the foregoing Petition For Writ Of Certiorari to the Court of Criminal Appeals of Alabama, properly stamped and addressed and placed in the United States Mail, to the following:

Honorable Charles Graddick
Attorney General
State of Alabama
250 Administrative Building
Montgomery, Alabama 36130

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

BY: Larry W. Roney

Larry W. Roney
Post Office Box 128
Phenix City, Alabama 36867-0002
ATTORNEY FOR PETITIONER

IN TPE SUPREME COURT OF ALABAMA

LARRY GENE HEATH

[APPELLANT] PETITIONER

STATE OF ALABAMA

[APPELLEE] RESPONDENT

APPEALED FROM THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

of

LARRY W. RONEY
ATTORNEY AT LAW
P.O. BOX 128
PHENIX CITY, ALABAMA
ATTORNEY FOR APPELLANT

BRIEF AND ARGUMENT

THE RECORD AFFIRMATIVELY SHOWS THAT THE APPELLANT WAS CONVICTED OF THE SAME OFFENSE, WHICH IS PRECISELY THE SAME IN LAW AND FACT IN VIOLATION OF THE 5th AMENDMENT OF THE UNITED STATES CONSTITUTION.

In the opinion of the Court of Criminal Appeals rendered on July 5, 1983, the Court failed to address the issue as to whether or not the Appellant was tried and convicted of the same offense, which is precisely the same in law and fact as the offense of which he was convicted in the State of Georgia.

As the Court pointed out on Page 3 of it's opinion, there were no cited cases to any Federal case law involving jeopardy in multiple State prosecutions and because there are no Federal cases cited, the Court apparently ignored the law relative to multiple prosecutions for an offense, which are precisely the same in law and fact.

Apparently the Court relied on the case of Hare v State, 387 So. 2 d 299, 300 (Ala. Crim. App. 1980) in reaching it's decision in this case. The Hare case can be distinguished simply by looking at the facts in the Hare case, wherein the Court in Tennessee was dealing with the offense of possession of drugs in the State of Alabama, which are not precisely the same in law and fact.

The Appellant plead guilty to the offense of murder, which was a lesser included offense of the charge of murder caused and directed by the Appellant under the laws of the State of Georgia and received a life sentence. After the Appellant was sentenced in the State of Georgia to life imprisonment, he was returned to the State of Alabama and was prosecuted and convicted of the offense of murder during kidnapping. 1st degree in the State of Alabama for the murder of his wife, Rebecca Heath.

Apparently this case is one of first impression in the State of Alabama, and this Court has not ruled on a similar case involving the offense of murder where only one victim is involved.

CONCLUSION

Appellant contends that his constitutional rights guaranteed under the 5th Amendment of the United States Constitution and his rights guaranteed by Article I Section 9 of the Alabama Constitution prohibiting Double Jeopardy and Double Punishment have been violated. Further, Appellant contends that he relied upon his guaranteed Constitutional rights as set forth above in pleading guilty to a lesser included offense of murder of his wife, in the state of Georgia, and that the prosecution in the State of Alabama on the offense of murder during the course of kid napping of his wife, should be barred.

Therefore, after considering the facts, law and argument of Appellant, a Writ of Certiorari should be issued from this Court to the Court of Criminal Appeals correcting the errors complained of and reversing the judgment of the Court of Criminal Appeals and rendering such judgments as said Court have rendered in addition to such other relief as Petitioner may be entitled.

Respectfully submitted,

LARRY W. RONEY, ATTORNEY AT LAW, P.C.

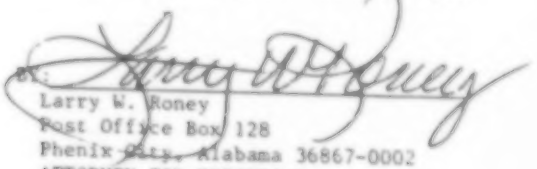
By: Larry W. Roney

Larry W. Roney
P.O. Box 128
Sheffield City, Alabama 35660-0002
ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that on this the 10th day of August, 1983, I served a copy of the foregoing Brief and Argument in Support of Petition For Writ Of Certiorari on Honorable Charles Graddick, Attorney General, State of Alabama, 250 Administrative Building, Montgomery, Alabama, 36130 by mailing said copy to him postage prepaid and properly addressed.

LARRY W. RONEY, ATTORNEY AT LAW, P.C.



By: Larry W. Roney

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

Supreme Court, U.S.
FILED
NOV 10 1984
ALEXANDER L. STEVAS
CLERK

ORIGINAL

NO. 84-5555

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

LARRY GENE HEATH,

Petitioner

v.

STATE OF ALABAMA

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

Counsel of Record

Office of the Attorney General
64 North Union Street
250 Administrative Building
Montgomery, Alabama 36130
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SUPREME COURT U.S.

QUESTIONS PRESENTED FOR REVIEW

1. Does this Court have jurisdiction to review a question which was not presented in or decided by the court below? Is any substantial federal question of Alabama's jurisdiction over the Petitioner's crime presented where a major portion of the crime, including the Petitioner's main acts in furtherance of the crime, took place in Alabama?

2. Should this Court grant certiorari as to the issue of whether the Petitioner's conviction in Alabama was barred by Double Jeopardy where the Court has repeatedly held for over 130 years that prosecution by separate sovereigns, such as Alabama and Georgia, does not constitute Double Jeopardy?

3. Does this Court have jurisdiction to decide a question which was not raised or considered in the court below? Is any substantial federal question raised as to whether Alabama acted ar a tool for Georgia in prosecuting the Petitioner where no facts presented suggested such a relationship?

4. Does this Court have jurisdiction to decide a question which was not raised or considered in the court below? Should this Court grant certiorari as to the issue of whether the Petitioner's death sentence violated Double Jeopardy where the Court has held for over 130 years that Double Jeopardy does not apply to prosecution by separate sovereigns such as Alabama and Georgia?

PARTIES

The caption contains the names of all parties in the courts below.

OPINIONS BELOW

The opinions of the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirming the Petitioner's conviction and sentence are attached as Appendix A & B.

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JURISDICTION

The decision of the Alabama Supreme Court from which the Petitioner's seeks relief was entered on July 6, 1984. This Court has jurisdiction pursuant to 28 U.S.C. Section 1257 as to the issue addressed under Argument II of this brief. This Court has no jurisdiction as to the other three issues raised by the Petitioner, addressed in this brief under Arguments I, III, and IV, because these issues were not presented to or passed upon by the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

The petition addresses issues under the Fifth and Fourteenth Amendments to the United States Constitution.

STATUTORY PROVISIONS INVOLVED

The petition addresses issues involving Code of Alabama 1975, Section 13A-5-40(a)(1) and Section 15-2-3, which are set out below.

> Section 13A-5-40(a)(1) reads as follows:
>
> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.
>
> Section 15-2-3 reads as follows:
>
> When the commission of an offense commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law.

STATEMENT OF THE CASE

(A) STATEMENT OF THE FACTS

Sometime during the late summer of 1981 the Petitioner, a resident of Russell County, Alabama,[1] decided to have his then pregnant wife Rebecca Heath, killed. After having approached several persons about doing the killing, the Petitioner reached an agreement with one Slim Owens that Owens and another man would do the job for two thousand dollars ($2,000.00).

Owens and the other man were to abduct Mrs. Heath using her own car; at an appointed spot a brick was to be placed on the accelerator of Mrs. Heath's car and a section of wire was to be used to secure the car's steering wheel, and the car was to be run into a creek at high speed with Mrs. Heath inside to make it appear as though her death was an accident. On the morning of August 31, 1981, the day chosen for the abduction and killing, the Petitioner, having placed the brick and the wire inside his wife's car, met Owen and his partner and lead them to his house in Russell County, Alabama. The Petitioner then told the two hired killers that they would have to enter his house and abduct his wife from it; he had previously left the door of his house unlocked for this purpose. Later that day the body of nine month pregnant Rebecca Heath was found on the side of the road in nearby Troup County, Georgia; she had been shot through the right eye.

(B) PROCEEDINGS BELOW

On February 10, 1982, the Petitioner pleaded guilty in the Superior Court of Troup County, Georgia, to the murder

---

[1]Russell County is located across the Chattahoochee River from the State of Georgia.

of Rebecca Heath. On May 5, 1982, the Petitioner was indicted by the Grand Jury of Russell County, Alabama, for the murder during a kidnapping in the first degree of Rebecca Heath in violation of Code of Alabama 1975, Section 13A-5-40(a)(1). On October 20, 1982, the Petitioner was arraigned and entered a plea of not guilty. On November 2, 1982, the Petitioner entered a plea of autrefois convict and a plea of former jeopardy; on December 10, 1982, the pleas of autrefois convict and former jeopardy were denied. Trial commenced on January 10, 1983; after hearing the evidence the jury found the Petitioner guilty as charged on the indictment. At a later sentence hearing the jury considered evidence of aggravating and mitigating circumstances, and recommended the punishment of death. The trial court, after weighing the aggravating and mitigating circumstances, followed the jury's recommendation and sentenced the Petitioner to death.

On July 5, 1983, the Alabama Court of Criminal Appeals affirmed the Petitioner's conviction and sentence, and on August 2, 1983, that Court overruled his application for rehearing. On July 6, 1984, the Alabama Supreme Court also affirmed the Petitioner's conviction and sentence.

SUMMARY OF ARGUMENT

The Court should not grant certiorari as to the question of whether Alabama properly had jurisdiction over the Petitioner's crime because: (a) the issue was not presented or decided below and therefore the Court has no jurisdiction to decide the issue; (b) Alabama properly exercised jurisdiction over the crime because a major portion of the kidnapping/murder occurred in Alabama; and (c) Alabama properly exercised jurisdiction over the Petitioner's crime because the Petitioner's own inculpatory acts in furtherance

of the kidnapping/murder occurred in Alabama.

The Court should not grant certiorari as to the issue of whether the Petitioner's conviction in Alabama after his conviction in Georgia violated the Double Jeopardy Clause because for over 130 years this Court has held that prosecution by separate sovereigns such as Alabama and Georgia does not involve Double Jeopardy.

The Court should not grant certiorari as to the issue of whether Alabama acted as a tool of Georgia in prosecuting the Petitioner in Alabama because: (a) the issue was not presented or decided below and therefore this Court has no jurisdiction to decide it, and (b) no facts presented suggest any such relationship between Alabama and Georgia law enforcement officials.

The Court should not grant certiorari as to the issue of whether the Petitioner's death sentence in Alabama was barred on Double Jeopardy grounds by his prior life sentence in Georgia because: (a) the issue was not raised or decided below and thus this Court does not have jurisdiction to decide the issue, and (b) this Court has held for over 130 years that Double Jeopardy does not apply to prosecution by separate sovereigns such as Alabama and Georgia.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION TO CONSIDER A QUESTION NOT PRESENTED TO OR DECIDED BY THE COURTS BELOW. THE PETITIONER'S CLAIM THAT ALABAMA HAS NO JURISDICTION OVER HIS CRIME PRESENTS NO SUBSTANTIAL FEDERAL QUESTION BECAUSE A MAJOR PORTION OF THE CRIME, INCLUDING THE PETITIONER'S MAIN ACTS IN FURTHERANCE OF IT, TOOK PLACE IN ALABAMA.

On page 4 through 8 of his petition for writ of certiorari the Petitioner makes a mottled argument as to the alleged illegality of his prosecution in Alabama. At first the Petitioner claims that his Fifth Amendment right against

Double Jeopardy was violated in that he was tried and convicted for an offense for which he had already been convicted in Georgia. The Petitioner next argues that Alabama had no jurisdiction at all over the offense, presumably regardless of Georgia's actions, because the offense occurred in Georgia, not Alabama. The first of these subarguments is addressed below under Argument II. The second is addressed immediately below.

This Court should not grant certiorari as to the issue of whether Alabama had jurisdiction of the offense of which the Petitioner was convicted, for three separate reasons. First, the issue was not addressed by the Alabama Supreme Court or by the Alabama Court of Criminal Appeals (see attached Appendices A and B). Where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary. Street v. New York, 394 U.S. 576, 582 (1969). The Petitioner claims at page 2 of his petition that the issue was raised below; however, it was not (see Appendices C, D, and E, copies of the Petitioner's brief to the Alabama Court of Criminal Appeals, his brief in support of rehearing in that court, and his brief in support of petition for writ of certiorari to the Alabama Supreme Court). An issue raised for the first time in this Court need not be decided by this Court, Moore v. Illinois, 408 U.S. 786, 799 (1972); moreover, this Court has no jurisdiction to decide such an issue. Street v. New York, at 581 & 582; Bailey v. Anderson, 326 U.S. 203, 206 & 207 (1945).

The second reason this Court should not grant certiorari as to the jurisdiction issue is that, contrary to the Petitioner's assertion, the offense did not occur solely in

Georgia. The Petitioner was convicted as an accomplice to a kidnapping/murder, which is defined under Code of Alabama 1975, Section 13A-5-40(a)(1) as follows:

> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant.

Under Alabama law capital offenses such as kidnapping/murder and robbery/murder consist of two element but not two different offenses. Ex parte Baldwin, 372 So. 2d 32 (Ala. 1979). The states generally have the authority to define their own crimes. United States v. Wheeler, 435 U.S. 313, 320 (1978); Rochin v. California, 342 U.S. 165, 168 (1952). Criminal liability in Alabama for a single offense commenced in Alabama and consummated outside of the state is provided in Code of Alabama 1975, Section 15-2-3, which reads as follows:

> When the commission of an offense commenced in the State of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law.

Section 15-2-3 is consistent with the general American rule regarding offenses the elements of which occur in different states. 22 C.J.S., Criminal Law §§115, 133(b)(1961); 21 Am. Jur.2d, Criminal Law, Section 345 (1981). Thus, contrary to the Petitioner's argument, there was no extraterritorial exercise of jurisdiction.

The third reason this Court should not grant certiorari as to the jurisdiction issue is that the Petitioner's own inculpatory acts were intimately connected with the State of Alabama. In his confession the Petitioner admitted that prior to the time of the offense he had placed a brick and some blue wire, both of which were to be used by the hired killers

in an attempt to make his wife's killing appear to be an accident, in the back floorboard of his wife's car which was parked at the Petitioner's home in Alabama (R. 544-546). The Defendant also admitted that on the morning of the crime he met the killers and lead them by car to his home in Alabama (R. 545 & 546), pointing out his house and telling them that they would have to go into the house and get his wife (R. 469 & 470). Thus not only did at least one-half of the crime, the kidnapping element, occur in Alabama, but also the Petitioner's primary inculpatory acts took place there. For this reason it is surely ironic that the Petitioner now claims that Alabama's assumption of jurisdiction over his criminal acts is improper.

On page 4 of his petition the Petitioner calls the Court's attention to its recent grant of certiorari in Fugate v. New Mexico, No. 83-6663 (October 1, 1984), suggesting that the issue in the case at bar regarding jurisdiction is related to the issue in Fugate. This is not the case. In the Fugate decision below, the New Mexico Supreme Court adhered to its earlier decisions that a defendant convicted of a lesser offense can later be prosecuted for a greater offense arising out of the same facts in a court in the same state where the first court did not have subject matter jurisdiction of the greater offense. State v. Fugate, 678 P. 2d 686 (N.M. 1984). Fugate is entirely distinct from the question raised by the Petitioner, concerning the extraterritorial limits of a state's criminal jurisdiction.

For the above reasons the Court should not grant certiorari as to this issue.

II. THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THE ISSUE OF WHETHER THE PETITIONER'S CONVICTION IN ALABAMA WAS BARRED BY DOUBLE JEOPARDY BECAUSE THE COURT HAS REPEATEDLY HELD FOR OVER 130 YEARS THAT PROSECUTION BY SEPARATE SOVEREIGNS, SUCH AS ALABAMA AND GEORGIA, DOES NOT CONSTITUTE DOUBLE JEOPARDY.

As a part of Argument I, on pages 4 and 5, and in Argument II, on pages 8 through 11, the Petitioner argues that his conviction for kidnapping/murder in Alabama after his conviction in Georgia for murder violates his Fifth Amendment protection against Double Jeopardy. This Honorable Court should not grant certiorari as to this issue because the position taken by the Petitioner is contrary to the holdings of this Court for the last 132 years.

The Double Jeopardy clause of the Fifth Amendment provides as follows:

> ...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...
>
> (emphasis added)

In Moore v. Illinois, 55 U.S. 13 (1852), the Court held that an act may constitute two different offenses where it violates the law of two different sovereigns.

> Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both...That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offense; but only that by one act he has committed two offenses, for each of which he is justly punishable.
>
> 55 U.S. at 20
> (emphasis added)

Thus developed the "dual sovereignty" doctrine, under which a person may be convicted in state court and subsequently tried for the same act in federal court, or vice versa, without violation of the constitutional protection against Double

Jeopardy. Abbate v. United States, 359 U.S. 187 (1959). This doctrine has continued to be applied by this Court in cases of alleged double jeopardy violations from multiple prosecutions; the questions concerning the application of the dual sovereignty doctrine have centered around whether the two governmental entities derived their power to prosecute from the same source. United States v. Wheeler, 435 U.S. 313 (1978)(Indian tribal law and Federal criminal law have sources independent of each other); Waller v. Florida, 397 U.S. 387 (1970)(a state and a municipality within that state are not separate entities because municipalities are creations of states).[2]

It appears that the situation of multiple state prosecutions has not been addressed by this Court. The application of the dual sovereignty doctrine to the present situation, however, is entirely proper. In United States v. Wheeler, supra, this court stated that the test for the existence of dual sovereignty was whether the ultimate source of the power under which the respective prosecutions were

---

[2]The Petitioner states in footnote on page 9 of his petition that in four cases this Court has cast doubt on the continuing validity of the dual sovereignty doctrine. The Respondent would disagree. In Benson v. Maryland, 395 U.S 784 (1969), the Court applied the Fifth Amendment's Double Jeopardy provision to the states, and bars one state's multiple prosecution of a defendant. In Ashe v. Swenson, 397 U.S 436 (1970), the Court utilized the protection against Double Jeopardy to prohibit one state's prosecution for two crimes where they both involved a common factual question which was decided favorably to the defendant in the first trial. In Murphy v. Waterfront Commission of New York, 378 U.S. 52 (1964), the Court held that self-incriminatory testimony obtained upon a grant of immunity by one jurisdiction cannot be used in a prosecution by another jurisdiction; the Court, however, did not hint that the prosecution by the second jurisdiction should be barred altogether. In Elkins v. United States, 364 U.S 206 (1960), the Court held that the fruits of an illegal search conducted by state officials could not be used in a federal trial; the Court did not bar the federal trial altogether.

undertaken was the same. 435 U.S. at 320. In Wheeler the court recognized that both a state and the federal government have the power, inherent in sovereigns, independently to determine what shall be an offense against their respective authorities and to punish such offenses, and in doing so they each exercise their own authorities, not that of each other. Id. Because each state is a separate sovereign vis a vis the federal government, each state must be considered a separate authority vis a vis other states.

The Petitioner asks this Court to grant certiorari based upon Brown v. Ohio, 432 U.S. 161 (1977). In Brown, two Ohio municipalities sought to prosecute a defendant based upon the same series of acts. The Court explicitly recognized that, because under Waller v. Florida, supra, the two municipalities must be considered to have derived their authority from the State of Ohio, the dual sovereignty doctrine had no application. 432 U.S. at 164 n. 4. Thus Brown is not relevant to the state/state situation.

As has been shown above, the prior decisions of this Court regarding the dual sovereignty doctrine clearly preclude the question now presented by the Petitioner. For this reason the Court should not waste its limited certiorari resources on the issue, and should deny certiorari as to this issue.

III. THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE A QUESTION WHICH WAS NOT RAISED OR CONSIDERED IN THE COURT BELOW. NO SUBSTANTIAL FEDERAL QUESTION IS RAISED AS TO WHETHER ALABAMA ACTED AS A TOOL FOR GEORGIA IN PROSECUTING THE PETITIONER BECAUSE NO FACTS SUGGEST SUCH A RELATIONSHIP.

On pages 12 and 13 of his petition the Petitioner argues that the dual sovereignty doctrine should not apply to this case because of the cooperation between law enforcement officials in Alabama and Georgia. This Court should not

grant certiorari as to this issue for two reasons. First, as was the case with the issue treated above under Argument I, the issue of whether the dual sovereignty doctrine should not be applied because of close cooperation in the investigation between officials of the two sovereigns was not decided below (see Appendices A and B). Where the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show to the contrary. Street v. New York, 394 U.S. 576, 582 (1969). The Petitioner claims at page 2 of his petition that the issue was raised below; however, it was not (see Appendices C, D, and E, copies of the Petitioner's brief to the Alabama Court of Criminal Appeals, his brief in support of rehearing in that Court, and his brief in support of petition for writ of certiorari to the Alabama Supreme Court). An issued raised for the first time in this Court need not be decided by this Court, Moore v. Illinois, 408 U.S. 786, 799 (1972); moreover, this Court has no jurisdiction to decide such an issue. Street v. New York, at 581 & 582; Bailey v. Anderson, 326 U.S. 203, 206 & 207 (1945).

The second reason this Court should not grant certiorari as to this issue is that the cooperation here falls far short of that required for the abandonment of the dual sovereignty doctrine. In Bartkus v. Illinois, 359 U.S 121, 122-124 (1959), this Court suggested that the dual sovereignty doctrine would not apply where one governmental entity was simply acting as a tool for another governmental entity in the prosecution. In Bartkus, however, the Court readily applied to dual sovereignty doctrine where there had only been cooperation between law enforcement agencies in the investigation. Bartkus v. Illinois, supra. In the case at

bar there was testimony of the cooperation of Alabama and Georgia law enforcement officials in the investigation of the crime, the kind of cooperation that was helpful and even necessary in the investigation of a crime that crossed state borders. There was no testimony, however, that suggested that the State of Alabama became a tool of the State of Georgia in the Alabama prosecution, or vice versa. Nor was there any reason for Georgia to be interested in prosecuting the Petitioner by way of Alabama's criminal law; the Petitioner had already pleaded guilty in Georgia and had been sentenced to a term of life in prisonment.[3] Even in brief the Petitioner makes no claim that Alabama served as Georgia's tool. Thus the Petitioner's claim that the dual sovereignty doctrine should not be applied because of law enforcement cooperation is simply insubstantial.

For the above reasons the Court should deny certiorari as to this issue.

IV. THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE A QUESTION WHICH WAS NOT RAISED OR CONSIDERED IN THE COURTS BELOW. THIS COURT SHOULD NOT GRANT CERTIORARI AS TO THE ISSUE OF WHETHER THE PETITIONER'S DEATH SENTENCE VIOLATED DOUBLE JEOPARDY WHERE THE COURT HAS HELD FOR OVER 130 YEARS THAT DOUBLE JEOPARDY DOES NOT APPLY TO PROSECUTION BY SEPARATE SOVEREIGNS SUCH AS ALABAMA AND GEORGIA.

On pages 13 and 14 of his petition the Petitioner asserts that Bullington v. Missouri, 451 U.S. 430 (1981), and Arizona v. Rumsey, _____ U.S. _____, 81 L. Ed 2d 164 (1984), bar his Alabama death sentence after he was given a sentence of life in Georgia. There are two reasons this Court should not grant certiorari as to this issue.

First, Bullington and Rumsey were both based upon the

---

[3]By contrast, in Bartkus the defendant was acquited in federal court before the State of Illinois even indicted him.

principle of Double Jeopardy. As has been argued above under Argument II, this Court has consistently ruled that the constitutional prohibition against Double Jeopardy does not apply to prosecutions by two independent sovereigns, as is the case here.

Second, this issue, like the issues addressed under Arguments I and III, was not presented to or decided by the courts below (see Appendices A, B, C, D and E). Based upon the cases cited under Arguments I and III this Court should not grant certiorari on an issue not presented or passed on below.

For the above reasons the Court should not grant certiorari as to this issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

CHARLES A. GRADDICK
ALABAMA ATTORNEY GENERAL

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

OFFICE OF THE ATTORNEY GENERAL
250 ADMINISTRATIVE BUILDING
64 NORTH UNION STREET
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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that on this 9th day of November, 1984, I did serve upon the Honorable Ronald J. Allen, Counsel for Petitioner, Northwestern University School of Law, 357 E. Chicago Avenue, Chicago, Illinois 60611, a copy of the aforegoing, by placing said copy in the United States Mail, first class postage prepaid.

William D. Little

WILLIAM D. LITTLE
ATTORNEY FOR RESPONDENT

APPENDIX

Supreme Court of the United States

No. 84-5555

Larry Gene Heath,

Petitioner,

v.

Alabama

On Petition for Writ of Certiorari to the Supreme Court of the State of Alabama.

On Consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question II.

In addition, the parties are requested to address the following question:

'What is the applicability, if any, of the dual sovereignty doctrine to successive prosecution by two different states?'

Justice Powell took no part in the consideration or decision of this motion and this petition.

March 4, 1985

Office - Supreme Court, U.S.
FILED
APR 15 1985
ALEXANDER L. STEVAS
CLERK

No. 84-5555

In the Supreme Court of the United States

OCTOBER TERM, 1984

LARRY GENE HEATH, PETITIONER

v.

STATE OF ALABAMA, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED OCTOBER 4, 1984
CERTIORARI GRANTED MARCH 4, 1985

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Proceedings
	SUPERIOR COURT OF TROUP COUNTY, GEORGIA
11/3/81	Mr. Larry Heath [Petitioner] and five other persons are indicted by grand jury for the murder [Ga. Code § 26-1101 (1968)] of Mrs. Rebecca Heath.
11/3/81	State of Georgia serves notice to Mr. Heath of aggravating circumstance under Ga. Code § 27-2534.1(b)(6) (1973), seeking death penalty.
2/10/82	Mr. Heath pleads guilty to murder, Ga. Code § 26-1101 (1968); is sentenced to life imprisonment. Ga. Code § 27-2528 (1973).
	CIRCUIT COURT OF RUSSELL COUNTY, ALABAMA
5/5/82	Mr. Larry Heath indicted by grand jury for murder during kidnapping [Ala. Code § 13A-5-40(a)(1) (1981)] of Mrs. Rebecca Heath.
11/2/82	Mr. Heath pleads autrefois convict and former jeopardy under the Alabama and United States Constitutions.
11/3/82	Judge sets hearing on pleas for 11/24/82.
11/4/82	Mr. Heath enters plea to territorial jurisdiction.
11/24/82	Hearing on pleas of autrefois convict and former jeopardy under Alabama and United States Constitutions.
12/10/82	Judge rejects pleas of autrefois convict and former jeopardy under Alabama and United States Constitutions.
12/10/82	Judge defers ruling on plea to jurisdiction until close of defendant Mr. Heath's case-in-chief.

Date	Proceedings
12/13/82	Judge amends deferral on ruling on plea to jurisdiction setting ruling for close of prosecution's case-in-chief.
1/10 to 1/12/83	Mr. Heath is tried for murder of Mrs. Rebecca Heath. Ala. Code § 13A-5-40(a)(1) (1981)
1/11/83	Mr. Heath renews pleas of autrefois convict and former jeopardy under Alabama and United States Constitutions in open court.
1/12/83	Mr. Heath moves for directed verdict of acquittal at close of prosecution's case-in-chief on basis of plea to territorial jurisdiction. Motion and plea are denied.
1/12/83	Mr. Heath renews pleas of autrefois convict and former jeopardy under Alabama and United States Constitutions at close of prosecution's case-in-chief. Pleas are again denied.
1/12/83	Jury finds Mr. Heath guilty of murder. Ala. Code § 13A-5-40(a)(1) (1981).
1/13/83	Sentencing hearing. Jury renders advisory verdict of death sentence.
2/9/83	Presentence hearing.
2/10/83	Trial judge makes findings; sentences Mr. Heath to death.
	ALABAMA COURT OF CRIMINAL APPEALS
2/10/83	Automatic appeal filed.
7/5/83	Court affirms Mr. Heath's conviction and sentence; rejects Mr. Heath's pleas of autrefois convict and former jeopardy under the Alabama and United States Constitutions.
8/2/83	Court rejects Mr. Heath's petition for rehearing.

Date	Proceedings
	SUPREME COURT OF ALABAMA
8/10/83	Mr. Heath filed petition for writ of certiorari with court.
8/25/83	Petition for writ of certiorari granted.
7/6/84	Court affirms Mr. Heath's conviction and death sentence; rejects Mr. Heath's pleas of autrefois convict and former jeopardy under the Alabama and United States Constitutions.

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, ALABAMA

No. CC-82-392

STATE OF ALABAMA

vs.

LARRY GENE HEATH, DEFENDANT

INDICTMENT FOR MURDER RETURNED BY GRAND JURY OF TROUP COUNTY, GEORGIA NOVEMBER 3, 1981

[Trial Record at 740. Also set out at trial record at 750, 798, and 808.]

* * * *

In the name and behalf of the citizens of Georgia, charge and accuse LARRY GENE HEATH, JERRY WAYNE HEATH, DENISE PAIGE LAMBERT, CHARLES EDWARD OWENS a.k.a. "SLIM", GREGORY HUGHES LUMPKIN, and SAMMY WILLIAMS a.k.a. "CASH" with the offense of MURDER (26-1101); for that the said LARRY GENE HEATH, JERRY WAYNE HEATH, DENISE PAIGE LAMBERT, CHARLES EDWARD OWENS a.k.a. "SLIM", GREGORY HUGHES LUMPKIN, and SAMMY WILLIAMS a.k.a. "CASH" on the date of August 31, 1981.

In the county aforesaid, did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon.

IN THE SUPERIOR COURT OF TROUP
STATE OF GEORGIA

Indictment No. ———
Charge: Murder—Death Penalty

THE STATE OF GEORGIA

v.

LARRY GENE HEATH

NOTICE OF AGGRAVATING CIRCUMSTANCES

The State desires to seek the Death Penalty in the above-styled case;

You, LARRY GENE HEATH, are hereby placed on notice that the State shall seek the Death Penalty in the above-referenced case, and further, that the State seeks the Death Penalty under the following section of Georgia law, *Ga. Code 27-2534.1*, and expects the aggravating circumstance to be shown under the evidence to be that:

Code 27-2534.1(6). The offense of Murder of REBECCA McGUIRE HEATH was caused and directed by defendant LARRY GENE HEATH.

The State respectfully requests the Court to notify the jury in writing of the above aggravating circumstance under the evidence in said case so that the jury, if they recommend the Death Penalty, shall give the above aggravating circumstance to support said sentence if they (the jury) so find said circumstances to exist under the evidence in said case.

Respectfully submitted,

/s/ Art Mallory
ART MALLORY
District Attorney
Coweta Judicial Circuit

[Trial Record at 742. Also set out at trial record at 752, 800, and 810. Certificate of Service omitted.]

IN THE SUPERIOR COURT
OF TROUP COUNTY, GEORGIA
February Term, 1982

Case No. 986

Charge—Murder

THE STATE

vs.

LARRY GENE HEATH

PLEA OF GUILTY

WHEREUPON it is ordered and adjudged by the Court that the Defendant(s) LARRY GENE HEATH be taken from the Bar of the Court to the jail of Troup County, and be there safely kept until a sufficient guard is sent for him from the State Penal System and be then delivered to, and be by said guard taken to such penal institution in said system as the Director of Corrections may direct, where he, the said defendant, shall be confined at labor for a term of LIFE to be computed according to law.

• • • •

The defendant(s), LARRY GENE HEATH (was) represented in this matter by the Honorable LEE HASTY AND R. MICHAEL KEY, attorney at law, of LAGRANGE, GEORGIA.

By the Court February 10, 1982

/s/ Joseph Jackson
Judge Superior Court
Coweta Circuit
Presiding

District Attorney

[Trial Record at 744. Also set out at trial record at 754, 802, and 812.]

THE STATE OF ALABAMA
RUSSELL COUNTY CIRCUIT COURT

Spring Term, 1982

INDICTMENT FOR MURDER DURING KIDNAPPING RETURNED BY GRAND JURY OF RUSSELL COUNTY, ALABAMA MAY 5, 1982

[Trial Record at 728.]

The Grand Jury of said County charge that before the finding of this Indictment Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath with intent to inflict physical injury upon her, in violation of § 13A-5-40(a)(1) of the Code of Alabama 1975, as amended, against the peace and dignity of the State of Alabama.

/s/ Wm. J. Burton
District Attorney of the
26th Judicial Circuit

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, ALABAMA

Case No. CC-82-392

STATE OF ALABAMA, PLAINTIFF

vs.

LARRY GENE HEATH, DEFENDANT

PLEA OF AUTREFOIS CONVICT

Comes the Defendant by and through his Court appointed Counsel, Larry W. Roney, and for plea says:

The State ought not to further prosecute this Indictment against him because at November, 1981 term of Superior Court of Troup County, Georgia, an Indictment was found and presented against him charging that Larry Gene Heath on the date of August 31, 1981, in the County aforesaid, did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon. That the State of Georgia sought the death penalty under the following section of Georgia law, *Ga. Code 27-2534.1*, and expected the aggravating circumstances to be shown under the evidence that: *Code 27-2534.1(6)*. The offense of Murder of REBECCA MCGUIRE HEATH was caused and directed by Defendant, LARRY GENE HEATH. Said Indictment bears the case number of 986, Page 198 in the Superior Court of Troup County, Georgia. A copy of said Indictment and Notice of Aggravating Circumstances are attached hereto as Exhibit "A"; that at February, 1982 term of said Court, on, to-wit: the Defendant entered a plea of guilty to the charge of Murder of Rebecca McGuire Heath as charged in said Indictment in case number 986, docket number 198 in the Superior Court of Troup

County, Georgia and was duly convicted by said Court of said offense charged, which this Defendant alleges was based upon and is of the same matters and transactions as is alleged in this Indictment or prosecution, of which he is now charged. All of which the Defendant is ready to verify and prays judgment that he should be discharged as to the present Indictment. A copy of the judgment and sentence of the Superior Court of Troup County, Georgia, in case number 986, docket number 198 is attached hereto as Exhibit "B".

DATED: November 2, 1982

LARRY W. RONEY
Attorney at Law, P.C.

By: /s/ Larry W. Roney
LARRY W. RONEY
P.O. Box 128
Phenix City, Alabama 36867-0002
Attorney for Defendant

/s/ R. Michael Raiford
R. MICHAEL RAIFORD
Attorney for Defendant

[Trial Record at 735-6. Supporting documents omitted.]

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, ALABAMA

Case No. CC-82-392

STATE OF ALABAMA, PLAINTIFF

vs.

LARRY GENE HEATH, DEFENDANT

PLEA OF FORMER JEOPARDY

Comes the Defendant by and through his Court appointed attorney of record, Larry W. Roney, and for plea says:

He has once been in jeopardy for the offense of which he is now charged in this Indictment and that, at the November, 1981 term of the Superior Court of Troup County, Georgia, to-wit: on the 10th day of February, 1982, the Defendant was in due form arraigned and pleaded not guilty to the said offense charged, which was in substance as follows: for that the said Larry Gene Heath on the date of August 31, 1981, in the County aforesaid, did then and there unlawfully with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon. That the State of Georgia sought the death penalty under the following section of Georgia law, *Ga. Code 27-2534.1*, and expected the aggravating circumstances to be shown under the evidence to be that: *Code 27-2534.1(6)*. The offense of Murder of Rebecca McGuire Heath was caused and directed by Defendant Larry Gene Heath. Said Indictment bears the case number of 986, Page 198 in the Superior Court of Troup County, Georgia. A copy of said Indictment and Notice of Aggravating Circumstances are attached hereto as Exhibit "A"; and that the Defendant was thus put upon trial for such offense and, after he had pleaded to the

same and was thus in jeopardy, that on February 10, 1982, the Defendant entered a plea of guilty to the charge of Murder of Rebecca McGuire Heath as charged in said Indictment in Case Number 986, Docket 198 in the Superior Court of Troup County, Georgia, and was sentenced to life imprisonment. A copy of said judgment and sentence is attached hereto as Exhibit "B". That said prosecution and conviction bars a subsequent prosecution for the same offense, all of which the Defendant is ready to verify, and he prays judgment of this Court that he be discharged from the premises in the present Indictment specified.

DATED: November 2, 1982

LARRY W. RONEY
Attorney at Law, P.C.

By: /s/ Larry W. Roney
LARRY W. RONEY
P.O. Box 128
Phenix City, Alabama 36867-0002
Attorney for Defendant

/s/ R. Michael Raiford
R. MICHAEL RAIFORD
Attorney for Defendant

[Trial Record at 745-6. Supporting documents omitted.]

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, ALABAMA

No. CC-82-392

STATE OF ALABAMA

vs.

LARRY GENE HEATH, DEFENDANT

TRIAL JUDGE'S FINDINGS AND ORDERS REGARDING PLEAS OF AUTREFOIS CONVICT AND FORMER JEOPARDY DECEMBER 10, 1982

[Trial Record at 774-7.]

ORDER

The defendant has filed a motion to suppress, plea to the jurisdiction, plea of former jeopardy, and a plea of autrefois convict. A hearing was held on these motions, at which oral testimony was heard by the Court and exhibits were admitted into evidence. Counsel for the defendant have provided the Court a brief giving their contentions and authorities therefor. Based upon the foregoing, the Court makes the following findings of fact:

a. Larry Gene Heath, the defendant herein, was indicted by the November, 1981 term of the grand jury for the Superior Court of Troup County, Georgia for the murder of Rebecca McGuire Heath. On November 3, 1981 the District Attorney for Troup County gave defendant written notice that it was seeking the death penalty under the aggravating circumstances that the district attorney expected to prove that the murder or

Rebecca McGuire Heath was caused and directed by the defendant.

b. On February 10, 1982 defendant entered a plea of guilty in the Superior Court of Troup County, Georgia to the offense of Murder of Rebecca McGuire Heath. He was adjudged guilty of murder and sentenced to life imprisonment.

c. On May 5, 1982 the grand jury for the Spring Term, 1982 of Russell County Circuit Court indicted the defendant for the capital offense of murder of Rebecca Heath during a kidnapping in the first degree of Rebecca Heath.

The defendant contends that the prosecution of the offense charged in this case is barred by the constitutional doctrine of former jeopardy. He further contends in his plea of autrefois convict that the State of Alabama should not prosecute the indictment in this case because of the indictment, adjudication of guilt, and sentence entered in the Superior Court of Troup County, Georgia.

The Court of Criminal Appeals has held in *Hare v. State*, 387 So. 2d 299 (1980) that a conviction in one state for an act in violation of its laws is not a bar to a prosecution in another for the same act if it violates the laws of the latter state, unless it is otherwise provided by statute or unless by compact between the state it has been agreed that jurisdiction shall vest exclusively in the state first apprehending and arresting the accused.

There is no statute in Alabama barring the prosecution in the instant case. There is also no compact between Alabama and Georgia agreeing that jurisdiction will be in the state first arresting an accused.

Therefore, assuming arguendo that the crimes were the same in Georgia and Alabama or if the defendant's conviction of murder in Georgia were viewed as a lesser included offense of the crime charged in Alabama, defendant's pleas of former jeopardy and autrefois convict are inapplicable and not legally sufficient.

It is, therefore,

CONSIDERED, ORDERED, AND ADJUDGED BY THE COURT:

1. The plea of former jeopardy filed by defendant on November 2, 1982 is overruled and denied.

2. The plea of autrefois convict filed by defendant on November 2, 1982 is overruled and denied.

* * * *

DONE this the 10th day of December, 1982.

/s/ Wayne T. Johnson
Circuit Judge

IN THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

No. CC-82-392

STATE OF ALABAMA,

vs.

LARRY GENE HEATH, DEFENDANT

PORTION OF PROSECUTION'S OPENING STATEMENT TO JURY CONCERNING ALABAMA'S LAW OF TERRITORIAL CRIMINAL JURISDICTION JANUARY 11, 1983

[Trial Record at 309-10.]

* * * *

[R-309] Ladies and gentlemen, this case is based on a state statute that says that if a crime is started in this state, within the county it's started it has what we call venue, which gives the court jurisdiction to try the case, even though it might have been consummated or completed outside of the county. Our laws are such that the legislature sets the laws up to protect the State of Alabama. The people affected become the witnesses. When an act is committed and whenever [R-310] we read an indictment, it's a crime against the State of Alabama.

Our law further says when you have a felony, that you have it submitted to the grand jury and the grand jury—

MR. RONEY: We're going to object to Mr. Benton quoting the law. The law is expected to come from the Court with regard to this matter.

THE COURT: If it's a matter of the indictment being brought, the objection will be overruled as to that particular part of an opening statement. Any quotation of the law, the objection will be sustained.

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TESTIMONY OF C. L. HUDSON, WITNESS FOR THE PROSECUTION JANUARY 11, 1983

[Trial Record at 333-9.]

* * * *

[R-333] C. L. HUDSON

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Benton:

Q. Will you state your name, please.

A. C. L. Hudson.

Q. Where do you live, Mr. Hudson?

A. In LaGrange, Georgia.

Q. I call your attention to August the 31st, 1981, in the morning part of the day, and I'll ask you where you were on that date, please, sir.

A. Well, at the particular time—let's say what particular time.

Q. Well, somewhere in the neighborhood of nine o'clock.

[R-334] A. Around nine o'clock? Okay. I was at my home on Smokey Road, which is in, I guess, the south part of Troup County or almost in Pine Mountain. I was at my home at nine o'clock.

Q. And could you turn your attention to approximately 9:15 and tell us where you were?

A. I left my home around nine or maybe 9:10 or so and was headed west on Smokey Road toward Hamilton Road, and at that time I saw a car—would you like me to tell you what I saw?

Q. Yes, sir, tell us what you saw and observed there that morning.

A. At that time I saw a car.

Q. First, could you describe the weather conditions at that time of day there?

MR. RAIFORD: Your Honor, we're going to object to the compound questioning; he hasn't had a chance to answer the question he originally asked him.

THE COURT: Let's take it a step at a time. Delay answering your question further.

Ask the question you were about to.

Q. Will you describe the weather conditions at approximately 9:15 A. M. on the day of August 31st, 1981?

A. Yes. It was a cloudy morning, hazy, foggy.

Q. All right, sir. If you will, now continue and tell us what you saw and observed that morning.

A. Okay. As I was traveling west on Smokey Road toward Hamilton Road I saw a car in the road in front of me. It apparently had turned out, turned around, or something, because when I came over the hill it was sideways in the road, and [R-335] then it straightened up and was going away from me at a high rate of speed.

* * * *

Q. And you say that the weather condition was sort of hazy?

A. It was hazy, cloudy, smoky.

* * * *

Q. I'll ask you if you saw anything else there, please, sir.

A. Well, after I passed the place where the car had turned around or pulled out of, say a hundred yards further down the road on the left-hand side of the road, there was a green car pulled off into the edge of the woods. It was probably thirty or forty feet off the road on the left-hand side.

Q. Did you go to that car or—

A. Well, to start with I went past the car, and I felt like something might be wrong, so I did turn around and go back to the car. I got out of my truck—I have a four-wheel drive truck—I got out of the truck, went down to

the car to see if anybody was in it. At that time the motor was [R-336] running on the car, the car was idling, the headlights were on, and the windows were fogged on the inside—you know, apparently somebody was inside the car breathing, and so forth.

And I looked into the front seat of the car, which I figured if anybody was hurt they would be in the front seat of the car, you know. The car was apparently against the trees on an inclined position. And I looked into the front seat of the car and nobody was in the front, and as I turned to the car I saw a knee sticking up in the back seat. That's all I saw, one bluejean covered knee. And I figured I was somewhere I shouldn't be; figured it was a kid's car or it was kids in the back seat, and I went back and got in my truck and left.

Q. Did you ascertain what kind of car or what color car it was?

A. It was a green Oldsmobile or something of that nature. It was a good clean-looking car, real clean.

MR. BENTON: That's all from this witness.

CROSS-EXAMINATION

Questions by Mr. Raiford:

Q. Mr. Hudson, where do you live, please, sir?

A. I live on Smokey Road.

Q. What town is that near?

A. It's ten miles from LaGrange and about eight miles from Pine Mountain. I guess you would say halfway between.

Q. Is that in Troup County, Georgia?

A. It's in Troup County.

Q. And you say it was a cloudy, hazy day?

[R-337] A. It was hazy, yes, sir.

Q. When you came up on the green vehicle that you described here you said the windows were frosted up like—

A. Yes, like when you're in a car and, you know, it's hazy looking on the inside, like it's frosted up on the inside?

Q. In order to do that, would someone have to have been inside breathing air?

A. Supposedly, yes. I'm sure if the car got there somebody had to drive it there.

Q. So at the time you got there you saw this fog on the windows from the inside?

A. Right.

Q. And you saw—you looked in the back seat and you saw one leg?

A. Right.

Q. Did you see anything else?

A. Not at the car, no.

Q. Did you look in the front seat?

A. I looked over in the front seat to see if anybody was up there and nobody was in the front seat.

Q. Did you see anything at all in the front seat?

A. I didn't see a person up there; that's what I was looking for.

Q. Did you see any objects up there?

A. I wasn't looking for objects; I didn't see an object.

Q. Did you see anything unusual about the front seat?

A. No, just a front seat of a car.

Q. You said it was a clean car?

A. It was a real nice clean car. The interior seemed—the best I can recall was a white color, a real neat, clean [R-338] looking car.

Q. You would have seen something in the front seat if it had been something in there?

A. If it had been a person in there I probably would have; but as far as an object, I wasn't looking for an object.

Q. You said inside the car was white?

A. To my knowledge, the best I can remember—I went over it in my mind—it appeared to be white or beige or a light color.

Q. That car you found was about 9:15 in the morning?

A. Right around that, 9:15.

Q. That's on Eastern Time over in Georgia, isn't it?

A. The same time, yes, Eastern Time.

Q. The same time we have here?

A. I think the particular time would have been Daylight Savings Time.

Q. So it would have been the same time it would have been here?

A. Yes.

Q. Did you testify in this case or other related cases up in Troup County, Georgia?

A. Right.

MR. BENTON: We object to that.

THE COURT: Objection will be sustained.

MR. RAIFORD: That's all we have, your Honor.

REDIRECT EXAMINATION

Questions by Mr. Benton:

Q. Mr. Hudson, have you seen on humid days cars fog up [R-339] when nobody was in them?

A. Oh, yes, I have.

Q. Was this day a damp day or a hazy day or a humid day?

A. It was a damp humid morning part, because with the Daylight Savings Time you're talking about, what, eight o'clock sun time?

Q. Let me ask you this: Could you make any determination if the car had recently been run at the time?

A. The car had just stopped there because—I'm sure most of you are familiar with how a car, when it starts cooling off, it will crackle. If you've driven one, the muffler system and all on it will pop and snap, the radiator, and so forth. It appeared to have been driven.

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TESTIMONY OF WILLIAM V. PRUITT, WITNESS FOR THE PROSECUTION JANUARY 11, 1983

[Trial Record at 339-44.]

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[R-339] WILLIAM V. PRUITT

called as a witness by and in behalf of the State of Alabama, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Benton:

Q. Will you state your full name for the record, please.
A. William V. Pruitt.
[R-340] Q. Mr. Pruitt, where do you live, please?
A. Big Springs Community, Troup County, Georgia.
Q. Where do you work?
A. Troup County Electric Membership Corporation.
Q. And were you working back on the date of August the 31st, 1981, at approximately 11:05 A. M. that morning?
A. Yes, sir, I was.
Q. And whereabouts were you working, please, sir?
A. I was traveling on the Smokey Road.
Q. Would you tell the Court and jury what you saw or observed there unusual on that morning?
A. Well, I was traveling west on the Smokey Road. About three-quarters to a mile from U. S. 27 I noticed this green Oldsmobile off the road against a pine tree. I passed the automobile—
MR. RONEY: Your Honor, we object to the narrative response to the question.
THE COURT: Ask you next question, please.
Q. All right, sir. And what did you do whenever you saw this car, please, sir?
A. At first I passed it, then I stopped. Had no intention of stopping but something made me want to stop.

I stopped, backed up, and walked down, looked at the automobile.

Q. Tell the Court and jury what you saw or observed when you went over to the car.

A. When I walked down to the automobile I looked in the dri er's side—driver's part first, then I looked at the right front fender, which was up against a tree; and as I turned to walk away I looked in the back seat and saw this person [R-341] laying in the back seat.

Q. And what did you do next, please, sir?

A. I went to the truck, radioed our dispatcher, requested the sheriff to come down.

Q. Did anyone come in response to your call?

A. Yes, sir, Don Mallory, an investigator with Troup County, came.

• • • •

Q. Approximately what time was it when you examined—got to the car, in your best judgment?

A. About five minutes after eleven.

Q. And at that time was the motor off or was it running or—

A. The motor was off.

MR. BENTON: Thank you.

You may have the witness.

CROSS-EXAMINATION

Questions by Mr. Raiford:

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[R-342] Q. August 31st, '81.

Do you know what the weather was on this particular day?

A. Yes, sir, it was cloudy, threatening to rain. In fact, it was quite a bit of moisture in the air.

Q. Where was the car sitting when you first observed it?

A. It was a ninety-degree angle with the pavement, about fifty feet from the pavement against a pine tree.

Q. Was it rammed into the pine tree or just parked next to it?

A. It was run against the pine tree, right. It did damage to the right front fender?

Q. Right front fender?

A. Yes, sir.

Q. When you came to the vehicle were you able to look inside?

A. Yes, sir, no problem at all.

Q. The windows were clear in there?

A. Right; visibility good.

Q. You said the motor was not running?

A. The motor was not running.

Q. Did you observe whether the motor was warm or cool, or did you observe that?

A. Not until after Don Mallory got there, and it was warm at that time.

• • • •

[R-343] Q. Now, this road is located in Harris County, Georgia?

A. No, sir, Troup County.

Q. Troup County, Georgia?

A. Yes, sir.

• • • •

[R-344] Q. I have one more question for you, Mr. Pruitt. Did you observe the body that was in the back seat of the car?

A. Yes, sir, I did.

Q. Was it fully clothed?

A. Yes, it was.

Q. And was the body disarrayed in any way or was it just laying on the seat?

A. It was laying across the seat. It was appeared that she was sitting opposite the driver's side on the back seat and fell across the seat.

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TESTIMONY OF CHARLES DONALD MALLORY, WITNESS FOR THE PROSECUTION JANUARY 11, 1983

[Trial Record at 346-50, 353-56.]

[R-346] CHARLES DONALD MALLORY

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Berton:

Q. Would you state your full name for the record, please, sir.

A. Charles Donald Mallory.

Q. Mr. Mallory, where are you employed?

A. Chief investigator with the Troup County Sheriff's Department.

* * * *

Q. Did you have an occasion to participate in the investigation of the death of Rebecca McGuire Heath?

A. Yes, sir, I did.

Q. Did this investigation include participating with the Russell County authorities as well as elsewhere?

A. Yes, sir.

Q. I'll ask you if you are familiar with a road designated as Smokey Road in Troup County, Mr. Mallory.

A. Yes, sir, I am.

Q. Did you have an occasion on the date of August the 31st, 1981, to go to that road?

A. I did.

Q. Approximately what time of the day was it when you arrived there, please, sir?

[R-347] A. It was approximately 11:15 A.M.

Q. And who if anyone else was there when you arrived there?

A. When I arrived Mr. Val Pruitt with the Troup County EMC was there.

Q. What did you see or observe when you arrived there, please, sir?

A. When I arrived the first thing I saw was this green Oldsmobile approximately fifty feet off the roadway up against a tree.

Mr. Pruitt was standing approximately ten feet away.

• • • •

[R-348] Q. What did you do next, sir?

A. As soon as I got out of my vehicle I immediately went to the driver's side of the car and noticed that there was a body laying on the back seat. I immediately opened the door, raised the driver's seat forward, attempted to find a pulse on the lady that was in the back seat, which I failed to get a pulse in the arm. I attempted to find one in the neck area; I was unable to get any pulse there. But I did notice at that time that the body was extremely warm, to the point of being wet under the neck with perspiration.

Q. Continue on, please.

A. As soon as I had determined that there was no heart or heartbeat or pulse or pulse beat, we called the ambulance to the scene.

Q. Now, was the body removed from the car?

A. After several photographs and a crime scene search was made, the body was removed from the car.

• • • •

[R-349] Q. I show you now what has been identified as State's Exhibit 3. Can you identify that exhibit?

A. Yes, sir. This is another photograph of the body that was on this morning in the rear seat, taken from the driver's side showing the position of the body and the face and the contents that were there with her, her purse and other shopping bag.

Q. Does that truly and accurately depict the scene as it existed of that subject matter at the time that you made that picture on the morning of August 31st, 1981?

A. Yes, sir.

• • • •

Q. Mr. Mallory, I show you what has been marked State's Exhibit 21 and I'll ask you if you can identify that exhibit, please, sir.

A. Yes, sir. This is a photograph that I took after the body had been removed from the automobile, that shows the rear seat and the floorboard area, shows the bloodstains in the rear seat, and also in the floorboard what appeared to me [R-350] as a piece of green plastic wire and a small red toy truck.

Q. Does that truly and accurately depict the area of the vehicle as it existed on August 31st, 1981, after the body was removed?

A. Yes, sir.

• • • •

Q. Now, after the body was removed did you go with the body to the hospital or wherever they took it?

A. Yes, sir. I followed the ambulance to the West Georgia Medical Center.

Q. Now, prior to the body being removed did you make an examination of the body itself?

A. Yes, sir. As soon as we got the body out of the rear seat and had it laid out on the stretcher, I then attempted to locate any wounds about the head area. At first glance there didn't appear to be any; then I opened the eyelids and found the left eye—I mean, excuse me —the right eye was damaged quite a bit. It appeared to have—that the eyeball was busted.

Q. Did you see any bruises, abrasions, or wounds on the body other than that wound that you have just referred to?

A. No, sir.

• • • •

[R-353] Q. Did you have occasion to look through the automobile itself?

A. Yes, sir.

Q. What if anything did you see or observe there in the car, Officer Mallory?

A. Well, after I determined that the victim was dead, and while waiting for the arrival of the ambulance, I went over the car and made my photographs, and in the floorboard of the front of the car, the floorboard next to the accelerator there was a brick lying approximately two inches from the acelerator. In the rear of the floorboard was, as the picture shows, a piece of green plastic wire and a toy truck.

[R-354] Q. Was this a two- or four-door automobile?

A. Two-door automobile.

On the floorboard in the rear on the driver's side was a spot of blood. I noticed another spot or two of blood on the passenger's side of the automobile on the edge of the front seat which raises back and forth on a two-door car. It was a couple of spots of blood there, and the blood where her head was lying on the seat.

MR. BENTON: I have nothing further from Officer Mallory.

CROSS-EXAMINATION

Questions by Mr. Roney:

Q. Investigator Mallory, you stated that there were spots of blood on the floorboard. Was that in the rear?

A. Rear floorboard, yes, sir.

Q. Rear floorboard on the—

A. Driver's side of the automobile in the rear floorboard.

Q. And there was a spot of blood where else did you say?

A. On the passenger side of the edge of the seat, the part that raises back and forth on a two-door, on the very edge as you open the door you can see spots of blood on that.

Q. Could you tell in your experience in the investigation of these type matters whether or not the spots of blood appeared to have been placed there by the body being rubbed up against the passenger side of the seat, or whether or not these were sort of a spatter type blood?

A. It was not smeared as it would be, say, putting [R-355] a body in the car. It looked more just like splattered type blood or just dropped on there.

Q. And also the spot that you found on the driver's side in the back seat there, in the floorboard, how did that spot of blood appear to be? Was it smeared?

A. It looked probably like one drop of blood. No, it was not smeared. It was almost a round circle.

Q. Did it appear to be a splatter type spot of blood, in your opinion?

A. No. This was very near where the hand was laying off the seat, and there was some blood on the hand and on the purse and the fingers. It's a possibility it dropped off from the fingers.

Q. You stated that the body was warm to the extent that the area under the neck was wet; is that correct?

A. That's correct, yes, sir.

• • • •

Q. Do you have a judgment in your own opinion whether or not the person that you examined, which has been identified as Rebecca Heath, whether or not death had occurred just prior [R-356] to your arriving on the scene, or do you have any judgment as to the time of death?

A. I estimated, just from my experience in dealing with deaths, that she probably had been dead no longer than a couple of hours.

Q. And you were there at approximately 11:15, when you first arrived on the scene?

A. Yes, sir.

• • • •

TESTIMONY OF PRENTISS L. GRIFFITH, WITNESS FOR THE PROSECUTION JANUARY 11, 1983

[Trial Record at 358-64.]

* * * *

[R-358] PRENTISS L. GRIFFITH

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Benton:

Q. Sheriff, will you state your name for the record, please.

A. Prentiss L. Griffith.

Q. Mr. Griffith, do you hold an elected position in Russell County?

A. Yes, sir, I do.

Q. What is that, please?

[R-359] A. Sheriff.

* * * *

Q. What if anything did you do when you first learned of the death of Rebecca Heath, please, sir?

A. We were notified of the death of Rebecca Heath and asked to go to the residence, the Heath residence, and notify a member of the family that they needed to come to LaGrange, [R-360] Georgia.

Q. What member of the family was that, please, sir?

A. Larry Heath, the husband.

Q. Did you go to the residence?

A. Yes, sir.

Q. Was he there?

A. No, sir, no one there.

Q. Did you go anywhere else in regard to trying to locate him?

A. Yes, sir. We went next door to a neighbor and was directed to go to Banner Building on Fourth Avenue and Victory Drive in Columbus.

Q. And what if anything did you do then?

A. We saw Larry Heath at the Banner Building, Fourth Avenue and Victory Drive.

* * * *

[R-361] Q. Did y'all go back and do that?

A. Yes, sir, we did.

Q. Sheriff, is that house located in Russell County, Alabama?

A. Yes, sir. It's off 165 on Sunderlan Drive.

Q. Now, after having done that did you have the occasion to assign any of your men to assist Mr. Boswell in working on this case?

A. No, sir. Mr. Boswell would have had authority to use the investigative department for that.

Q. Do you know Sheriff Lowe from—I mean, excuse me, Sheriff Jones from Troup County?

A. Yes, sir, I do.

Q. Did you see him or have occasion to work with him or Investigator Don Mallory?

A. Yes, sir.

Q. Was that done in Russell County or Troup County?

A. Both.

Q. Sheriff, let me ask you this: Did you make any trips to Troup County yourself?

A. Yes, sir, I did.

Q. Have you got a judgment as to how many trips you made there?

A. Concerning the case totally?

Q. Yes, sir.

A. Four or five; I believe five, Mr. Benton.

Q. Did you authorize your subordinates to make trips to cooperate in the ongoing investigation, your investigation as well as theirs?

A. Yes, sir, I did.

* * * *

[R-362] CROSS-EXAMINATION

Questions by Mr. Roney:

* * * *

[R-363] Q. You stated that you made four or five trips to Troup County.

A. Yes, sir.

Q. Did you ever go to the scene of the crime?

A. No, sir, I never did.

Q. You never went to Smokey Road, I believe, in Troup County?

A. No, sir.

Q. You've never been to where the car was found, the 1978 Cutlass Oldsmobile?

A. No, sir.

Q. Do you know the location?

A. Only that it's on Smokey Road, that's all I—

Q. Do you know the approximately distance from the courthouse to that location there?

A. From the courthouse here?

Q. Yes, sir.

A. No, sir, I really don't.

Q. You don't have any judgment?

A. Fifty miles, I guess.

Q. Fifty miles approximately?

A. I'm not sure of the distance between here and LaGrange.

Q. From the Heath residence off Highway 165, what would you estimate the distance from the Heath residence to the Smokey Road area in Troup County?

A. Not knowing, Mr. Roney, the exact location of the Smokey Road, I would not estimate that.

[R-364] Q. Do you know how far it is from the courthouse to the Heath residence, approximately?

A. From here to the Heath residence?

Q. Yes, sir.

A. Approximately three, three and a half miles.

Q. Three, three and a half miles? In your best judgment how long would it take you to drive from the Russell County courthouse to the Heath residence on a normal day?

A. Depending on the time of day and traffic conditions.

Q. Well, say, from seven o'clock in the morning until nine o'clock in the morning.

A. Ten minutes, at the most.

Q. On a normal day how long would it take you to drive from the courthouse in Russell County to the Smokey Road area?

A. (No answer.)

Q. Placing the time between seven and nine A.M.

A. I really don't know. I don't know the location of the—only the Smokey Road area, that it's in an area near or in LaGrange.

Q. So you don't know whether it's south or north of LaGrange or to the east or to the west?

A. I sure don't.

* * * *

TESTIMONY OF THOMAS F. BOSWELL, WITNESS FOR THE PROSECUTION JANUARY 11, 1983

[Trial Record at 367, 385.]

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[R-367] THOMAS F. BOSWELL

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Benton:

Q. State your name for the record, please, sir.
A. Thomas F. Boswell.
Q. Mr. Boswell, where are you employed?
A. Russell County Sheriff's Department.

• • • •

[R-385] Q. Could you name some of the other officers that did some work?
A. Deputy Ammons.
Q. Bobby Ammons?
A. Yes, sir. He picked up some items. I can't remember offhand who else was involved in it.
Q. I'll ask you if the Alabama Crime Lab participated in this investigation.
A. Yes, sir, they did.
Q. And who representing the lab?
A. Criminalist Ted Hudson from the Auburn lab came down.
Q. Do you have knowledge of any difficulty that Criminalist Hudson is having today in his family?
A. Well, yes, sir. To a certain degree, yes, sir.
Q. Would you tell us what the problem is?
MR. RONEY: Your Honor, we're going to—
MR. RAIFORD: Object. Hearsay.

THE COURT: Objection would be sustained.

MR. BENTON: We'll withdraw it, then.

Q. Mr. Boswell, can you or any of the officers that you worked with ascertain exactly what point and place that the fatal shot was fired into the head of Rebecca Heath?

A. Not that I know of, no, sir.

Q. I show you what's been marked as State's Exhibit 14. I'll ask you to examine that exhibit and identify it, if you can. What is in the exhibit, please, sir?

A. Looks like some jewelry: earrings, a watch, a necklace; a can of Arid Extra Dry deodorant and an instant—

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TESTIMONY OF HOMER A. DAVIS, WITNESS FOR THE PROSECUTION JANUARY 11, 1983

[Trial Record at 402-4.]

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[R-402] HOMER A. DAVIS

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Benton:

Q. Will you state your name for the record, please, sir.

A. Homer A. Davis.

Q. Mr. Davis, where do you live, please, sir?

A. Live on Overland Drive off of 165.

Q. And what is that community there called, please, sir?

[R-403] A. Sunderlan Drive I think is the word—I mean, is the name of the street they're using. It doesn't really have any name.

Q. Is that the street right adjacent to Sunderlan Church?

A. Right, sir.

Q. Do you know Larry Heath?

A. Yes, sir.

Q. Does he live on that street?

A. He did, yes, sir.

Q. I call your attention to the date of August 31st, 1981, at approximately seven or 7:15 in the morning. Could you tell us where you were?

A. I was leaving for work. My house is located down the street from him and I was going up toward 165 going to work at about 7:15.

Q. Did you see or observe any vehicles on the street that you live on or right adjacent to that street?

A. Yes, sir. There was a vehicle that turned in off of 165 onto Sunderlan Drive. And it was a casual observance of it, you know, I didn't notice it that much. It looked like a van at the time. I did notice an out-of-state tag on it on the front. As I proceeded on up to the stop sign the Heath car came on around the corner the same—

MR. RONEY: Your Honor, we're going to object to the narrative response to the question.

THE COURT: Objection will be sustained. Ask your next question.

Q. After you observed the first car you have testified to, Mr. Davis, did you see a second vehicle?

[R-404] A. Yes, sir.

A. I recognized that as the Heath car.

Q. Where was that relative to the first vehicle that you just testified to?

A. It came in right behind it, about ten or fifteen seconds after it.

Q. And what if anything further did you see and observe about these two vehicles?

A. As I pulled up to the stop sign I looked in my rear view mirror, both cars were parked side by side, one kind of on the side of the road, the other one in the middle. The Heath car was in the middle of the road. And I turned left and went on into town.

Q. And was that actually down on the street on which you live?

A. Yes, sir.

Q. Did you see any other vehicles around there at that time?

A. Not on that street; I didn't pay any attention to any others, no, sir.

Q. I show you what's been marked State's Exhibit 7. I'll ask you if you can identify that exhibit, please, sir.

A. Yes, sir. That is Sunderlan Drive going up towards 165 just below the Heath house.

Q. Would you take my pencil, please, sir, and put an X where you saw the cars parked side by side on that road?

A. It was approximately right in here.

• • • •

TESTIMONY OF ROBERT OWEN, WITNESS FOR THE PROSECUTION JANUARY 11, 1983

[Trial Record at 408-11.]

* * * *

[R-408] ROBERT OWEN

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Benton:

Q. State your name for the record, please, sir.
A. Robert Owen.
Q. Mr. Owen, where do you live, please?
A. Fort Mitchell Road.
Q. Were you living there back on the date of August the 31st, 1981?
A. No, sir. Then I lived on Sunderlan Drive.
Q. Is that close to the same place that Larry Heath lived?
A. Yes, sir, across the street.
Q. I'll ask you if, calling your attention to the morning of August the 31st, 1981, at the hour of 7:15 or thereabouts, if you saw or observed anything relative to the area of the Sunderlan Church.
[R-409] A. Yes, sir. I saw the Heath vehicle leave his house and go meet a white Mustang down at the Sunderlan Baptist Church.
Q. You said you saw the Heath vehicle leave the Heath house?
A. Yes, sir.
Q. And go to the area of the Sunderlan Church?
A. Yes, sir.
Q. And meet a vehicle?
A. Yes, sir.

Q. What type vehicle did it meet, please, sir?

A. It was around a '65 Mustang, a white color.

Q. Now, did you see or observe anything other than that happen between these two cars?

A. Well, the person in the Heath vehicle got out and went to talk to the person in the Mustang.

Q. I show you what's been marked as State's Exhibit 5 and ask you if you can identify that exhibit.

A. Yes, sir. That's the church where the two cars were.

Q. Does that truly and accurately depict that church and that scene around the church as it existed that day, possibly with the exception of the foliage on the trees?

A. Yes, sir, I would think so.

Q. As far as the church and the roads in the area?

A. Yes, sir.

MR. BENTON: We move to introduce into evidence State's Exhibit 5.

MR. RONEY: We renew our objection, your Honor, based on the remoteness of the photo.

THE COURT: Objection will be overruled.

[R-410] It will be admitted into evidence as No. 5 for the state.

Q. I show you what's been introduced as State's Exhibit 6 and I'll ask you if you can identify that exhibit.

A. Yes, sir. This is the scene, the location I was in when I was looking toward the church on Sunderlan Drive.

Q. From that vantage point can you show where you were and where the cars were at the time you saw them?

THE COURT: Stand up and point it out to the jury.

MR. BENTON: If you will, stand up right here. We're going to do it in two sections. We're going to do it the first half and then move down to the other half. If you will, use a pen here and point out as you show it to the jury.

(The witness left the witness stand and stood before the jury box.)

A. I had come from my house down here and I stopped approximately right here.

Q. Hold it up like this, so they can see.

A. Right along here by the road, and the cars were right down here, right past the first driveway into the church, between the first and the second driveway.

Q. You had come from where, now?

A. From down here up—stopped right here at 165.

Q. And at that time, this road, does that lead down to the Heath house?

A. Yes, sir, my house and the Heath house.

Q. Let's move on down so the other members of the jury can see it, please. Go ahead.

A. I stopped right along here, and the Heath vehicle [R-411] and the other car was right down here in front of the church by these driveways.

Q. What happened after you saw these two cars get together there?

A. Well, the person that was in the Heath vehicle went to talk to the person in the white Mustang.

Q. And then what happened?

A. I went on to town; I don't have any idea; I went on to work.

MR. BENTON: Did everbody get to see that? Have a seat.

(The witness returned to the witness stand.)

MR. BENTON: That's all from this witness. Your witness.

* * * *

TESTIMONY OF WILLIAM J. MALUEG, WITNESS FOR THE PROSECUTION JANUARY 12, 1983

[Trial Record at 535, 539-40, 542-48, 550-51, 557, 560-61.]

• • • •

[R-535] WILLIAM J. MALUEG

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

REDIRECT EXAMINATION

Questions by Mr. Benton:

Q. Mr. Malueg, where are you employed, please, sir?

A. My name is Bill Malueg, I'm employed with the Georgia State Bureau of Investigation as a special agent.

• • • •

[R-539] Q. This has been marked as State's Exhibit 23 and I'll ask you to look at it and see if you can identify it, please.

A. Yes, sir. This is the waiver of rights certificate that Larry Heath signed in my presence and in the presence of Don Mallory, and this sheet contains a time that the waiver was signed and basically—

[R-540] Q. What time—

A. —enumerates what went on.

Q. What time was the statement taken?

A. 6:48 P.M. on September 4th, 1981.

• • • •

[R-542] Q. Will you please read the complete exhibit to the jury, please, sir, including the waiver of rights.

A. "Waiver Certificate. Date: 9/4/81. Time: 6:48 P.M. Place: Georgia State Patrol Barracks, LaGrange, Georgia.

"I, Larry Gene Heath, am twenty-nine years of age. My address is Route 6, Box 557E, Phenix City, Alabama. I completed the twelfth grade in school.

"I know that Bill Malueg, GBI, and Don Mallory, Troup County investigator, is a special agent with the Georgia Bureau of Investigation. He has told me that: one, I have the right to remain silent; two, anything I say can be used against me in a court of law. Three, I have the right to talk to a lawyer and have him present with me while I am being questioned; four, if I cannot afford to hire a lawyer, one will be appointed to represent me before any questioning, if I wish; five, I can decide at any time to exercise these rights and not answer any questions or make any statements.

"I understand my rights. Having these rights in mind, I am willing now to talk about the crime of murder of which I am suspected. I have not been threatened. I have not been promised anything. I have not been forced in any way to answer questions or make a statement." [R-543] And below that Larry Gene Heath's signature appears.

And then below that "Larry Gene Heath was advised of his rights by me at the time, date, and place shown above. He was not coerced in any manner to say or do anything. He freely and voluntarily waived his rights and agreed to answer questions and make a statement." I witnessed that and Don Mallory, investigator, also witnessed that.

Q. Will you read the statement now?

A. The written formal statement began at 7:50 P.M. on 9/4/81 in the interview room.

"I guess that this thing started about two or three weeks ago. I approached my brother, Jerry Heath, of what I had in mind to do. My oldest brother, Ricky Heath, was in trouble with the authorities already, and Jerry got in touch with them and set up a meeting with Ricky and myself. I told Ricky that I wanted my wife taken care of because I knew that if I got a divorce I

wouldn't be able to keep my son. The meeting took place at Lakebottom in Columbus. Money was passed. I gave Ricky $40.00 to spend the night in a motel. Ricky left and nothing happened. The job was supposed to be taken care of for $500.00. Ricky was going to be the 'in between,' if you want to call him that, and he was going to get someone to do it. But, like I said, nothing ever happened.

"When that fell through I got in touch with Jerry again and Jerry said he knew of somebody else that might do it. He got in touch with these people several times but nothing ever developed. So he finally told me where to go.

"The place that I went to was on Sixth Avenue in Columbus in an apartment on the top floor. I drew a map to show it better. I went over there alone about a week before [R-544] August 31st. Edward was the only one there and I talked to him about it. Edward's nickname is 'Slim.'

"He then"—excuse me—"He told me that he got in touch with—he told me that he would get in touch with me in the next couple of days. I don't remember the exact date but Slim and two other blacks came to Banner Buildings in a 1965 or 1966 Ford Mustang, solid white. The Mustang had Texas license plates on it. They stayed in the car and I came out to meet them. The individual that was supposed to actually do it walked off with me and we discussed how it was to be done. I told him that I wanted my wife to look like she had been in an accident. I paid him $100.00 up front and I was supposed to meet them at Slim's apartment after I got off work. He asked me if I had a pistol to scare her with, to get her in the car. I told him that I would bring it with me when I came to the apartment later that afternoon.

"When I got off work I went by the apartment and discussed how it was to be done and turned over my gun to him. This gun is the only one that I had and it was a .357 Magnum. The instructions that I gave them were

that she was to take me to work the following morning, and that he would know what corner to be at to force his way into the car with her. The guy that was supposed to get in the car with her was the one that I gave my gun to but I don't know his name.

"The next morning I stoped by Slim's apartment to finalize everything. They were supposed to be having transportation problems and I came up with another $300.00 for them to get a car with. I put that money into Slim's hands directly. That had to be either Tuesday or Wednesday of last week.

[R-545] "For two days straight Becky came to LaGrange to do some shopping and they never did anything in those two days. I tried to get in touch with them several times but no one was ever there. When I finally got with Slim again, which was in the latter part of last week, the man that he had found had dropped out of sight. So Slim said that he and his partner would do it. I don't know the partner's name but he was one who owned the white Mustang and, by phone conversation, I think that he lives in Benning Hills.

"For a couple of days I didn't hear anything out of Slim until he called my house Sunday night—(Monday morning)—"at two o'clock A.M. He told me that he had his partner there and that he was ready. I told him to call me at the office at nine o'clock A.M.

"I left the house early that morning about six A.M. The brick was already in the back floorboard because I had picked it up from where I had ran over it. I had also placed a blue wire in the back floorboard to be used to tie the steering wheel down.

"I went by Slim's apartment and explained to him how I wanted it done, and I gave him a phone number of where he could reach me so that I could—so I could turn my car over to him.

"I went over to Denise Lambert's apartment to wait for his call. He called between 7:15 A.M. and 7:30 A.M., I think. I asked Denise to follow me to the Chevron sta-

tion on Victory Drive. Slim and his partner showed up in the white Mustang maybe five or ten minutes before eight o'clock. I got into Denise's truck and they followed me to my house.

"I pulled down Sunderlan Drive and stopped. Slim's [R-546] partner was driving my car and he pulled up beside me and I pointed out the house to him. The white Mustang followed my car around the truck and they were side by side in front of my house when I backed the truck onto Highway 165. I had left the house unlocked but they had my keys and they got in the house with them.

"After I left my house I went to Denise's apartment and stayed there for fifteen minutes or so. Before we went to Denise's, though, we sat in the Chevron station on Victory Drive and waited for them to go by, but they never came by. So that's when we started to Denise's apartment.

"I had drawn them a map with instructions on where to go but they didn't follow them. After we left Denise's apartment, Denise drove me to the Chevron station where she let me and Hamilton out. I got a newspaper at the Chevron station and walked across the street to the Fisca station, where I talked to Ed, the manager.

"After that, I wanted to Banner Buildings to go to work. Like I said before, I had given them instructions on what to do but they didn't do it like I wanted them to. They were not supposed to have shot her. They were supposed to have tied down the steering wheel and placed the brick on the accelerator and made it look like an accident where the car went between the two ridges at Flat Shoals Creek. But they didn't do that. I was as shocked as anyone when I found out about—when I found out that she had been shot.

"The reason that I had this done is that I found out my wife had had an affair with another man and our relationship had just fallen apart. I knew that if I filed for a divorce I probably wouldn't have been able to keep

my son. [R-547] I feel almost certain that the baby she was carrying wasn't mine."

And I asked him a question: "Larry, is there anything that you would like to add or change or delete from this statement?"

Answer: "No."

"I can read and write and I have read the five pages of this statement and I swear to God that it is the truth."

And I signed my signature, Don Mallory signed his signature, and Larry Heath signed his signature.

Q. All right, sir. Now, how many pages does the statement consist of, please, sir?

A. Five pages of that statement.

Q. Are there any drawings or maps affixed as part of that?

A. Yes, sir. After the statement was taken Mr. Heath was in a very cooperative mood and he wanted to assist us in identifying the other people that were involved in this. Into the furtherance of that he drew a map or a sketch of where Edwards or Slim, who was later identified as Charles Edward Owens, where he lived. He drew a map of this for me and he signed his name on this also.

Q. All right, sir. Would you step down here before the jury, please, sir, and just hold the map up so that they can see?

(The witness left the witness stand and stood before the jury box.)

Q. Take half of them, take half there, and these people out here have got to see too. But stand right out here, please, and hold it up where they can see it.

[R-548] A. Okay. This is in Columbus, Sixth Avenue, and this is Fourth Street, and this is a housing project right here, Victory Drive, Sixth Avenue. And he gave me a description of the apartment complex, which is kind of like a horseshoe, and he drew that off and he put a mark right at the—on the top apartment and on the corner of where Slim lived.

* * * *

Q. Mr. Malueg, did you participate in the arrest of Charles Edward, alias Slim Owen?

A. Yes, I did.

• • • •

Q. Where was he arrested, please, sir?

A. He was arrested in the described apartment.

• • • •

[R-550] Q. Let me call your attention to the date of the 4th and 28th of '82 and I'll ask you if you were in Troup County on that date.

A. Yes, sir, I was.

Q. Were you with or in the same area in which Larry Heath was on that date?

A. Yes, sir.

Q. And what was the occasion for you to be there and him to be there at that time and place?

A. At that time we were in the process of trying Charles Edward Owens and Gregory Hughes Lumpkin and Mr. Heath was called to the stand as a witness to testify.

Q. I'll ask you if you were able to—first of all, was he sworn?

A. Yes, sir, he was.

Q. And were you in a position where you could hear what his statements were?

A. Yes, sir. I was seated at the prosecution table with the district attorney.

Q. I'll ask you if he made a statement with reference to the abduction of his wife from Alabama.

A. Yes, sir, he did.

• • • •

[R 551] Q. Were any spontaneous statements made by Mr. Heath?

A. Yes, sir. He had refused to testify, based on the fact, as he explained, that there was an implication that other charges might be filed at a later time because of

the fact that his wife was abducted from—and taken from Alabama.

MR. RAIFORD: Your Honor, we're going to object. That's an unresponsive answer to the question Mr. Benton asked.

THE COURT: Overruled. Go ahead.

A. That she was abducted and taken from Russell County, Alabama, into the State of Georgia, she crossed the state line.

Q. Do you know where Miss Denise Lambert lived, please, sir?

A. She lived in an apartment, 102, on—I believe it was 1200 Fifteenth Street in Columbus.

• • • •

[R-557] WILLIAM J. MALUEG

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

RECROSS-EXAMINATION

Questions by Mr. Roney:

• • • •

[R-560] Q. (By Mr. Roney) Officer Malueg, what was the nature of the investigation that you were conducting at the time the statement was taken which has been marked State's Exhibit 23?

[R-561] A. We were investigating the murder of Becky Heath.

Q. And where did that murder take place?

A. I don't know.

Q. Where was the body found?

A. Troup County, Georgia.

Q. During your course of your investigation have you been able to establish the place of the murder?

A. No, sir.

Q. Do you know of any knowledge or do you have any knowledge of anyone else that would have knowledge as to where the murder actually occurred?

A. I suspect some of the people I have been talking to have knowledge of that, but the investigators on the case--

Q. I'm talking about the state's witnesses or the law-enforcement officers that you have dealt with.

A. No, sir.

• • • •

TESTIMONY OF DOUG LUCAS, WITNESS FOR THE PROSECUTION JANUARY 12, 1983

[Trial Record at 568-72.]

* * * *

[R-568] DOUG LUCAS

called as a witness by and in behalf of the State of Alabama, having been first duly sworn, testified as follows on

DIRECT EXAMINATION

Questions by Mr. Benton:

Q. Will you state your name for the record, please, sir.

A. Doug Lucas.

Q. Mr. Lucas, where are you employed, please, sir?

A. Southern Discount, Columbus, Georgia.

Q. What is Southern Discount, please, sir?

A. It's a consumer finance company.

Q. A place you borrow money from?

A. Yes, sir.

* * * *

Q. Do you know Larry Heath?

[R-569] A. I do, sir.

Q. I'll ask you if you had an occasion to have an application for a loan made out by Larry to your company.

A. An application was placed through our company on September the 12th of '81.

* * * *

Q. Did Mr. Heath apply for more than one loan with you?

A. Only one loan, sir.

* * * *

Q. I may have misunderstood you just now. What date did you refer to earlier? Did you say "August" or "September?"

A. I stand corrected. It was August the 12th of '81 that we received the application. It was approved, subject to them signing, on the 13th; and being that it was connected [R-570] with real estate, they received the money on the 18th.

Q. For how much, please, sir?

A. Approximately $2,500.00.

Q. Could that loan have been made without the signature of Rebecca Heath?

A. It could not, sir.

Q. Did he attempt to secure it without her signature?

A. He hesitated to make the loan subject to her signing because—and the reason I asked him to sign—

MR. RAIFORD: Objection, your Honor, unresponsive to the question that has been asked.

THE COURT: Ask your question again.

Q. Did he attempt to get the money without her signature?

A. He didn't make an issue out of it that I recall.

Q. Well, did he ask for a loan with just his signature, not using his wife's signature?

MR. RAIFORD: You Honor, we object. It's a leading question.

THE COURT: Overruled.

Q. You may answer.

A. He wanted to know why she had to sign.

Q. He wanted to know what, sir?

A. Why she had to sign the papers.

Q. And the loan was made with both his signature and her signature on there?

A. Yes, sir.

Q. Whenever you advised Mr. Heath that his wife would have to sign it, what was his reaction?

A. He said, "Forget about it."

[R-571] Q. Then did he reconsider and apply for it?

A. He called me back again and I told him that I couldn't make it any other way; and he said, "Well, forget about it" the second time.

MR. RAIFORD: Your Honor, we object. There has been no predicate laid to a conversation.

THE COURT: Objection will be sustained.

Q. What date was that on, please, sir, tha the call was made, in your best judgment, if you know?

A. Somewhere around August the 10th.

Q. And was this by telephone?

A. Yes, sir.

Q. Had you talked to him on the telephone before, or were you familiar with his voice on the phone?

A. I was not, sir.

Q. When he ultimately made the loan, however, both signatures were on it?

A. Yes, sir.

MR. BENTON: Thank you, sir.

THE COURT: Anything further on direct examination?

MR. BENTON: No, sir.

MR. RAIFORD: We move to exclude the testimony as being immaterial and irrelevant to this cause, your Honor. We move to strike it and instruct the jury to disregard it.

THE COURT: Objection will be overruled; motions will be denied.

MR. RAIFORD: We move for a mistrial, then, your Honor.

[R-572] THE COURT: Mistrial will be denied. Do you have any questions on cross-examination?

MR. RAIFORD: Yes, sir.

THE COURT: Please go ahead.

* * * *

CROSS-EXAMINATION

Questions by Mr. Raiford:

Q. Mr. Lucas, when your company made the loan to Mr. and Mrs. Heath and you said that Becky Heath would be required to sign it, sign the application, was this a real estate loan or—

A. Yes, sir.

Q. —second mortgage?

A. Second mortgage loan.

Q. Now, if someone came in to make a loan at your business other than a second mortgage on a real estate, say just an unsecured loan or a signature loan, would you normally require both parties to sign it, husband and wife?

A. Only if he didn't have enough income to justify it.

Q. So in a normal loan if there's—a normal loan application, if there's—if one person—say the husband is working and the wife is not working, and it's not a real estate loan, would there be anything—I mean, would you not give a loan because there was only one signature there?

MR. ESTES: Your Honor, I'm going to have to object to that question. It's a compound question and it's unclear as to what a normal loan is supposed to be. I object to the question.

THE COURT: If you would rephrase it a little bit, narrow it down some, please.

* * * *

PLEAS TO TERRITORIAL JURISDICTION, AND OF AUTREFOIS CONVICT AND FORMER JEOPARDY DENIED BY TRIAL JUDGE AT CLOSE OF PROSECUTION'S CASE JANUARY 12, 1983

[Trial Record at 586-90.]

* * * *

[R-586] MR. BENTON: May it please the Court, the state rests.

* * * *

THE COURT: The state has rested. Defense counsel has informed me that certain motions are [R-587] desired to be made by them. Would you present those at this time, please?

MR. RONEY: Your Honor, the first question we have is—

THE COURT: I'm sorry, we can't hear you.

MR. ESTES: You need to stand behind the line, Larry, so he can hear you.

MR. RONEY: I'm sorry, I thought you were going to come up here.

Your Honor, first of all we would inquire of the Court whether or not the Court made a ruling on all motions which we have previously filed in this matter.

THE COURT: The only motions that have not been ruled upon at this point are a motion of former jeopardy or plea of former jeopardy and also a plea of autrefois convict.

MR. RAIFORD: A plea of jurisdiction also, your Honor. It should have been ruled on at the end of the state's case.

THE COURT: You bring that up again at this point?

MR. RONEY: Yes, sir, we also interpose the plea of jurisdiction in that there has been no showing—first of

all, we would move to exclude the state's evidence, your Honor, and specifically as grounds for the exclusion of the state's evidence the fact that the state has failed to prove the venue or jurisdiction of the crime itself. The state's evidence clearly from the stand indicates that the officers themselves do not know where the murder occurred, [R-588] whether it was the State of Georgia or State of Alabama. The only thing that Officer Malueg, I believe, testified to was that the body was found in Troup County, Georgia. Officer Mallory testified that the body was warm, having not been dead more than probably two hours, that the body had perspiration marks around the neck indicating that it was a recent death. There has been no statement or no evidence from this witness stand from the State of Alabama that there was ever a murder which occurred in the State of Alabama, and we would respectfully request that the plea of jurisdiction be granted, that the state's evidence be excluded with regard to any charge of murder against Mr. Larry Heath.

Next we would move to exclude the evidence based on the fact that the state has failed to make out a case of kidnapping, which is an aggravating circumstance under the charge which is pending against Mr. Larry Heath. There has been no evidence from the witness stand that there was an abduction from the home of Larry Heath. There has been no testimony that anyone saw Rebecca Heath removed from the home on the morning that she was found in Troup County, Georgia. For ought that appears, based on the statement introduced by the State of Alabama, which was written out by Officer Malueg, the person—or the person who actually made the statement, according to Officer Malueg, stated that Mrs. Heath was supposedly—supposed to be enroute to her parents in Georgia. With regard to any type of abduction, we feel the state has failed to make out a case with regard to kidnapping of Rebecca Heath or forcibly removing

her from the home of the Heaths, which was located in Russell County, Alabama, to the spot where the body was found in Troup County, Georgia.

[R-589] Your Honor, at this time we would also reassert our motion for plea of double—former jeopardy, in fact, for all the testimony from the witness stand indicates that these officers essentially testified to the same facts in the case which was concluded in Troup County Superior Court, being Case No. 986, in the Superior Court of Troup County, Georgia, wherein the defendant, Larry Heath, out of negotiations between he and the district attorney and his attorney at that point entered a plea of guilty to murder of Rebecca Heath, and on February 10, 1982, was sentenced to life imprisonment; that any testimony with regard to statements obtained or any evidence with regard to the charge of murder of Rebecca Heath which was pending in Troup County, Georgia, that this evidence should not be allowed in this particular court of law in that there has been no proof from the State of Alabama of any act or any criminal act which has occurred in the State of Alabama and, therefore, the charges or the state's evidence should be excluded in this case.

Your Honor, based on the new code of criminal procedure we would move for judgment of acquittal in this cause.

THE COURT: Response by the state?

MR. BENTON: Yes, sir, may it please the Court. The state relies on Title 15, Section 2-3 where it says, "When the commission of an offense commences in the State of Alabama and is consummated without the boundaries of the state, the offender is liable to be punished therefor in Alabama, and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law." We would state to the Court that there has been evidence that [R-590] the offense was commenced at the Heath residence in Russell County.

With regard to the kidnapping we would refer the Court's attention to Title 13A-6-40 in which it says the following definitions apply to kidnapping: "To restrain, to intentionally or knowingly restrict a person's movements unlawfully and without consent, so as to interfere substantially with their liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in places to which he has been moved. Restraint is without consent if it is accomplished by physical force, intimidation, or deception."

We submit to the Court that this was by deception for the purpose of murder.

THE COURT: These motions and response have been made outside the presence of the jury. The defendant has made a motion to exclude the state's evidence. That motion will be denied. A motion for judgment of acquittal; that motion will be denied. There is a motion to dismiss the case for lack of jurisdiction or a plea to the jurisdiction of this court; that plea and motion will each be denied.

The pleas of former jeopardy and autrefois convict are each denied.

* * * *

PORTION OF PROSECUTION'S FIRST CLOSING ARGUMENT TO JURY CONCERNING ALABAMA'S LAW OF TERRITORIAL CRIMINAL JURISDICTION JANUARY 12, 1983

[Trial Record at 610-1.]

* * * *

[R-610] MR. ESTES: The defense has made much and will make much in their closing, I'm sure, about the fact that we cannot tell you and we cannot show you exactly where and precisely how Rebecca McGuire Heath met her death; but I submit to you, and the judge will charge you, that under the law of Alabama, if that crime is commenced here in the State of Alabama [R-611]—and, indeed we submit it's been proven that she was kidnapped in the State of Alabama—if they took her to Tennessee or to New York or California or even the moon before they killed her, it makes no difference, that crime was commenced right here in Russell County, Alabama. And it makes no difference where she was killed; that was the culmination of that crime that began right here in Russell County, Alabama. And as a jury of Russell County citizens, I ask you to let the word go out from here that Russell County does not tolerate that kind of behavior, and I ask you to convict that defendant as he's charged in the indictment, to find him guilty.

Thank you very much.

THE COURT: Thank you, Mr. Estes.

* * * *

PORTION OF PROSECUTION'S SECOND CLOSING ARGUMENT TO JURY JANUARY 12, 1983

[Trial Record at 629.]

* * * *

[R-629] MR. BENTON: I'm not concerned what somebody else may have done. I'm concerned that one of our laws was broken and that one of our citizens of Russell County was taken and violated, whether it be by a family member or by somebody else. Our law calls that those folks have to answer and they have to answer to people just like you.

* * * *

I'm here to tell you that we cannot allow our citizens to be taken, whether they be killed in the house, in an automobile, or in a foreign land. The home has always been a place that we could seek refuge, and there are certain laws that give added protection to those when they're in your house or your place of business.

* * * *

PORTION OF JUDGE'S CHARGE TO TRIAL JURY CONCERNING ALABAMA'S LAW OF TERRITORIAL CRIMINAL JURISDICTION JANUARY 12, 1983

[Trial Record at 637.]

* * * *

[R-637] Now, the laws of Alabama state that a criminal charge may be brought against a person if the crime that's charged has been completed entirely in the State of Alabama. Alabama also has a law that states when a commission of an offense is commenced or begun in the State of Alabama and is consummated—that is, completed—without the boundaries of the state—that is, outside the boundaries of Alabama—the offender is liable to be punished for this offense in Alabama and venue—that is, the place where the criminal trial or the criminal charge is brought—would be in the county in which the offense was begun, unless it would otherwise be provided by law.

* * * *

JURY'S VERDICT
JANUARY 12, 1983

[Trial Record at 647-8.]

* * * *

[R-647] THE COURT: Mr. Wilks, you are the foreman of the jury?

JUROR JAMES R. WILKS: Yes, sir.

THE COURT: Has the jury taken a vote in regards to the verdict in this case?

JUROR JAMES R. WILKS: Yes, sir, the jury has took a verdict—I mean, a vote.

THE COURT: Has the jury unanimously decided upon a verdict?

JUROR JAMES R. WILKS: Yes, sir, the jury has unanimously decided upon a verdict.

THE COURT: Would you stand, please, and read the verdict of the jury.

JUROR JAMES R. WILKS: We, the jury, find the defendant guilty of murder during kidnapping in the first degree as charged in the indictment. This 12th day of January 1983.

* * * *

[R-648] THE COURT: The verdict being unanimous and in one of the proper forms, will be received by the Court at this time.

* * * *

TRIAL JURY'S ADVISORY VERDICT OF DEATH SENTENCE JANUARY 12, 1983

[Trial Record at 697.]

* * * *

[R-697] THE COURT: Has the jury reached an advisory verdict?

JUROR JAMES R. WILKS: Yes, sir, we've reached a verdict.

THE COURT: Would you stand, please, and read the verdict?

JUROR JAMES R. WILKS: We, the jury, after weighing the aggravating and mitigating circumstances of this case, determine that the one or more aggravating circumstances outweigh the mitigating circumstances, and recommend the punishment of the defendant be death."

* * * *

IN THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

Criminal Action No. CC 82-392

STATE OF ALABAMA, PLAINTIFF

vs.

LARRY GENE HEATH, DEFENDANT

JURY VERDICT

We, the jury, find the defendant guilty of murder during kidnapping in the first degree, as charged in the indictment.

This 12 day of January, 1983.

/s/ James R. Wilks
Foreman

IN THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

Criminal Action No. CC 82-392

STATE OF ALABAMA, PLAINTIFF

vs.

LARRY GENE HEATH, DEFENDANT

JURY VERDICT

We, the jury, after weighing the aggravating and mitigating circumstances in this case, determine that the one or more aggravating circumstances outweigh the mitigating circumstances, and recommend the punishment of the the defendant at death.

Vote for this verdict 12

Vote against this verdict —

This 13th day of January, 1983.

/s/ James R. Wilks
Foreman

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, ALABAMA

No. CC-82-392

STATE OF ALABAMA

vs.

LARRY GENE HEATH, DEFENDANT

TRIAL JUDGE'S ORAL FINDINGS IN SENTENCING PHASE AND IMPOSITION OF DEATH SENTENCE, FEBRUARY 10, 1983

[Trial Record at 718-721.]

* * * *

[R-718] THE COURT: The record will reflect the rulings of the Court and the bases therefor on those rulings.

Upon the jury verdict of guilty of murder during kidnapping in the first degree, the Court adjudges the defendant guilty of murder during kidnapping in the first degree, that is, that Larry Gene Heath did intentionally cause the death of Rebecca Heath by shooting her with a pistol, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of or attempt to abduct Rebecca Heath with the intent to inflict physical injury upon her, in violation of Section 13A-5-40(a)(1) of the Code of Alabama 1975, as amended.

The Court finds the following aggravating circumstances to exist in this case: The capital offense was committed while the defendant was engaged in the commission of a kidnapping.

The Court finds that the following aggravating circumstances do not exist in this case: The capital offense was committed by a person under sentence of imprisonment.

The defendant was previously convicted of another capital felony involving the use of threat of violence to the person.

The defendant knowingly created a great risk of [R-719] death to many persons.

The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

The capital offense was committed for pecuniary gain.

The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

The capital offense was especially heinous, atrocious, or cruel compared to other offenses as interpreted by the appellate courts of this state and nation.

Upon consideration of all of the evidence brought forth at the trial in this case, the sentence hearing, and the presentence investigation report, the Court finds that the following mitigating circumstance does exist in this case: The defendant was convicted of the murder of Rebecca Heath in the Superior Court of Troup County, Georgia, on February 10th, 1982, and received a sentence of life imprisonment in that court.

The Court finds that the following mitigating circumstances do not exist in this case: First, that the defendant has no significant history of prior criminal activity. The Court finds that the defendant has before the sentence hearing been convicted of three felony offenses, those being buying, receiving, or concealing stolen property, forgery, and a criminal attempt of theft by extortion.

The other mitigating circumstances that do not exist in this case are as follows: The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

[R-720] The victim was a participant in the defendant's conduct or consented to it.

The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

The defendant acted under extreme duress or under the substantial domination of another person.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

The age of the defendant at the time of the crime.

Any other circumstances that have been offered pursuant to Section 13A-5-52 of the Code of Alabama.

Upon consideration of the evidence in this case, the matters brought forth in the sentence hearing, and the hearing conducted before the Court, and upon consideration of the aggravating/mitigating circumstances in this case, the Court finds that the aggravating circumstances outweighs any mitigating circumstances. It is, therefore, ordered by the Court that the punishment in this case is fixed at death.

It is ordered by the Court that the defendant, Larry Gene Heath, be sentenced to death by electrocution on the 17th day of March, 1983.

The Sheriff of Russell County, Alabama, shall deliver the same Larry Gene Heath to the custody of the Warden of the William C. Holman unit of the state prison system at Atmore, Alabama, together with a warrant from the clerk of this court as set forth hereafter.

The clerk of the court is ordered to issue a warrant under the seal of this court directed to the Warden of William [R-721] C. Holman unit of the state prison system at Atmore, Alabama, for the execution of the sentence of death, which warrant shall recite the fact of conviction and shall set forth specifically the offense, the judgment of the Court, and the time fixed for defendant's execution. This warrant shall command the warden to proceed at the time and place named in the sentence to

carry the same into execution as provided in Section 15-18-82, Code of Alabama 1975. The clerk shall deliver said warrant to the Sheriff of Russell County, Alabama, who shall deliver the same, together with the defendant, Larry Gene Heath, to the said warden.

Pursuant to Section 13A-5-55, the judgment of conviction is subject to an automatic review. Notice of appeal is entered and the sentence herein is suspended pending the appeal.

The findings that have just been recited will be reduced to writing, made a part of the record of the case, along with the other findings and requirements as provided by law.

The defendant will be remanded to the custody of the sheriff.

* * * *

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, ALABAMA

No. CC-82-392

STATE OF ALABAMA

vs.

LARRY GENE HEATH, DEFENDANT

TRIAL JUDGE'S WRITTEN FINDINGS IN SENTENCING PHASE AND IMPOSITION OF DEATH SENTENCE FEBRUARY 10, 1983

[Trial Record at 839-45. Also set out at Trial Record at 852-8.]

[839]

DETERMINATION OF SENTENCE BY THE COURT

The defendant herein, with assistance of counsel at all proceedings, was found guilty as charged in the indictment. Thereafter a sentence hearing with participation by the same jury as at trial was held. Pursuant to Section 13A-5-47, Code of Alabama 1975, the Court makes the following findings of fact summarizing the crime herein and the defendant's participation in the crime:

FINDINGS OF FACT
GUILT PHASE

In early August, 1982 defendant contacted his brother, Jerry Heath, and Jerry Heath set up a meeting at which he, defendant, and Ricky Heath, another brother of defendant, discussed defendant's intentions to kill his wife,

Rebecca Heath. Defendant gave Ricky Heath $40.00 for his expenses toward accomplishing that result; however, nothing developed from this meeting.

Defendant thereupon contacted Jerry Heath a second time. Jerry Heath told defendant he knew somebody else that might commit the murder. Subsequently Jerry Heath told defendant to meet a person at an apartment in Columbus, Georgia. This person was Charles Edward Owens. Sometime later Owens and two other men, Gregory Hughes [840] Lumpkin and Sanders Williams, went to defendant's place of employment. There defendant discussed with Williams the details of his plans. Defendant wanted the homicide to appear to be an accident. Defendant paid Williams $100.00 as a down payment. Later that day defendant went to Owens' apartment and gave a pistol to Williams. Defendant planned for Williams to force his way into Rebecca Heath's car while she took defendant to work. Williams was then to kill Rebecca Heath and make her death appear to be accidental. The next day defendant gave Owens another $300.00, so that they could obtain an automobile to carry out the plan.

Nothing materialized from this plan, and several days later Owens told defendant Williams had left and his whereabouts were unknown. Owens stated to defendant that he and his partner, Gregory Hughes Lumpkin, would do the job for defendant. Approximately two days later, on August 31, 1981, at about 2:00 A. M., Owens called defendant at defendant's home and said that he and Lumpkin were prepared for the job. At 6:00 A. M. defendant locked and left his house. Before leaving he put a brick in his car which was also used by his wife. The brick was to be placed on the accelerator in carrying out the appearances of an accident. He also left a piece of wiring in the car to tie down the steering wheel.

Defendant went to Owens' apartment and explained how he wanted the act done. Defendant then went to the apartment of his girlfriend, Denise Lambert, and waited

for a call from Owens. After receiving the call, defendant went to a service station in Columbus, [841] Georgia, and turned over his automobile, a 1978 green Oldsmobile, to Lumpkin. Owens was also present, driving a white Mustang.

Defendant and Denise Lambert, driving Lambert's truck, led Owens and Lumpkin to Russell County, Alabama. On the road leading to his house, defendant stopped and pointed out the house to Lumpkin. Defendant then left as Owens pulled up beside Lumpkin. Defendant had left his house keys on the key ring with his car keys, so that Lumpkin had the keys to the house. The evidence indicates that Rebecca Heath was in her home when defendant pointed out his house to Owens and Lumpkin. At 9:10 A. M. that same morning defendant's car was seen a short distance off the road known as Smokey Road in Troup County, Georgia. A light-colored Mustang was seen sideways in the road one hundred yards from defendant's automobile. It then went down the road at a high rate of speed.

The body of Rebecca Heath was found at approximately 11:00 A. M. She was dead, having suffered a fatal gunshot wound through the right eye and into the brain. She was nine months pregnant.

In August, 1981 defendant borrowed $2,500.00 from Southern Discount Company. Rebecca Heath was a cosigner of this loan. $500.00 of this loan was used by defendant to build concrete pads for his dog pen. Thereafter defendant formed the intention to use the balance of $2,000.00 to pay for the murder of his wife. This sum of money was used for that purpose.

Rebecca Heath was forcibly abducted from her home in Russell County, Alabama, for the purpose of inflicting sufficient physical [842] injury to her to cause her death. There is no evidence to suggest that at any time she was armed with any weapon. There is no evidence to indicate that the killing of Rebecca Heath was a justifiable or excusable homicide.

Defendant states that he formed the intention and plan to murder his wife because he was under the influence of extreme mental and emotional disturbance based upon his belief that his wife was engaged in an extramarital affair with another man and was pregnant by that man.

The Court finds that defendant initiated, procured, aided and abetted, and planned the abduction of Rebecca Heath so that she could be murdered. Defendant intentionally hired others with whom he was acting in complicity to intentionally abduct Rebecca Heath and to intentionally murder the said Rebecca Heath.

FINDINGS FROM SENTENCING PHASE

After the trial a sentence hearing was conducted with participation by the jury. The state rested upon the evidence brought forth at trial. The defendant presented evidence by witnesses called to testify. Arguments were made to the jury by both sides. The jury deliberated after being charged by the Court and unanimously returned a recommendation that defendant's punishment be death.

The Court ordered the probation officer for this circuit to prepare a written presentence investigation report. This report was duly prepared and filed. Copies of the same were furnished to counsel for both parties. A hearing was held for the parties to respond to the report and to present evidence about any part of the report which [843] would be the subject of a factual dispute. At this hearing the state presented no further evidence. The defendant testified and gave evidence disputing certain matters in the presentence investigation report. The defendant also stated that he did have remorse for the killing of his wife, Rebecca Heath.

The Court finds from the evidence presented in this case that the defendant was guilty and is guilty of the murder of Rebecca Heath during a kidnapping in the first degree of the said Rebecca Heath.

The Court finds the following aggravating circumstance to exist in this case: The capital offense was committed while the defendant was engaged in the commission of a kidnapping.

The Court finds that the following aggravating circumstances do not exist in this case:

A. The capital offense was committed by a person under sentence of imprisonment.

B. The defendant was previously convicted of another capital felony or a felony involving the use of threat of violence to the person.

C. The defendant knowingly created a great risk of death to many persons.

D. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

E. The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, or burglary.

[844] F. The capital offense was committed for pecuniary gain.

G. The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

H. The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.

Upon consideration of all of the evidence brought forth at the trial in this case, the sentence hearings, and the presentence investigation report, the Court finds that the following mitigating circumstance exists in this case: Defendant was convicted of the murder of Rebecca Heath in the Superior Court of Troup County, Georgia, on February 10, 1982, and received a sentence of life imprisonment in that court.

The Court finds that the following mitigating circumstances do not exist in this case:

A. The defendant has no significant history of prior criminal activity. The Court finds that the defendant does have a significant history of prior criminal activity in that before the sentence hearing in this case he was convicted of three felony offenses, those being buying, receiving or concealing stolen property, forgery, and a criminal attempt of theft by extortion.

B. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

C. The victim was a participant in the defendant's conduct or consented to it.

D. The defendant was an accomplice in the capital offense [845] committed by another person and his participation was relatively minor.

E. The defendant acted under extreme duress or under the substantial domination of another person.

F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired.

G. The age of the defendant at the time of the crime.

H. Any other mitigating circumstances offered pursuant to Section 13A-5-52, Code of Alabama 1975.

Upon considering and weighing the aggravating circumstance with the mitigating circumstances in this case, the Court is of the opinion that the aggravating circumstance outweighs any mitigating circumstances. It is, therefore,

ORDERED AND ADJUDGED BY THE COURT that the defendant be sentenced to death by electrocution as specified in the laws of this state and as set forth in an order of sentence by this Court.

DONE this the 10th day of February, 1983.

/s/ Wayne T. Johnson
Circuit Judge

IN THE CIRCUIT COURT
OF RUSSELL COUNTY, ALABAMA

No. CC-82-392

STATE OF ALABAMA

vs.

LARRY GENE HEATH, DEFENDANT

TRIAL JUDGE'S ORDER OF SENTENCING
FEBRUARY 10, 1983

[Trial Record at 834-6.]

[834] ORDER OF SENTENCING

This case is now before the Court for sentencing. The State is represented by its district attorney and the defendant is present in open court with his counsel, Larry W. Roney, Esq., and R. Michael Raiford, Esq. The Court has previously conducted a sentence hearing with participation by the jury and a hearing for the parties to present evidence regarding matters in the contents of the presentence report and for arguments to be made regarding the proper sentence in this case. The defendant, Larry Gene Heath, being asked by the Court if he has anything to say as to why the sentence of the Court should not be pronounced or before sentence is pronounced says proceedings violate the 5th Amendment and laws of this state.

Upon jury verdict of guilty of murder during kidnapping in the first degree, the Court adjudges the defendant guilty of murder during kidnapping in the first degree,

that is, that Larry Gene Heath did intentionally cause the death of Rebecca Heath by shooting her with a pistol, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or [835] attempt to abduct, Rebecca Heath, with the intent to inflict physical injury upon her, in violation of Section 13A-5-40(a)(1) of the Code of Alabama 1975, as amended. Upon consideration of the evidence in this case, the matters brought forth in the sentence hearing, and upon consideration of the aggravating and mitigating circumstances in this case, the Court finds that the aggravating circumstance outweighs any mitigating circumstances.

It is, therefore,

ORDERED BY THE COURT that the punishment in this case is fixed at death.

IT IS ORDERED BY THE COURT that the defendant, Larry Gene Heath, be sentenced to death by electrocution on the 17th day of March, 1983.

The Sheriff of Russell County, Alabama, shall deliver the said Larry Gene Heath to the custody of the Warden of the William C. Holman unit of the state prison system at Atmore, Alabama, together with a warrant from the clerk of this court as set forth hereafter.

The executioner designated by the laws of this state, at the proper place specified by law for the execution of one sentenced to death, shall cause a current of electricity of sufficient intensity to cause death to pass through the body of the defendant, with such current of electricity to be applied [836] and to continue until the defendant, Larry Gene Heath, is dead.

The clerk of this court is ordered to issue a warrant under the Seal of this Court directed to the warden of William C. Holman unit of the state prison system at Atmore, Alabama, for the execution of the sentence of death, which warrant shall recite the fact of conviction and shall set forth specifically the offense, the judgment of the Court, and the time fixed for defendant's execu-

tion. Said warrant shall command the warden to proceed at the time and place named in the sentence to carry the same into execution as provided in Section 15-18-82, Code of Alabama 1975. The clerk shall deliver said warrant to the Sheriff of Russell County, Alabama, who shall deliver the same, together with the defendant, Larry Gene Heath, to said warden.

Pursuant to Section 13A-5-55, the judgment of conviction is subject to automatic review. Notice of appeal is entered and the sentence herein is suspended, pending appeal.

DONE this the 10th day of February, 1983.

/s/ Wayne T. Johnson
Circuit Judge

COURT OF CRIMINAL APPEALS OF ALABAMA

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4 Div. 134

LARRY GENE HEATH

v.

STATE

July 5, 1983

Rehearing Denied Aug. 2, 1983

Larry W. Roney, Phenix City, for appellant.

Charles A. Graddick, Atty. Gen., and William D. Little and Ed Carnes, Asst. Attys. Gen., for appellee.

OPINION OF THE COURT

BOWEN, Presiding Judge.

In August of 1981, Rebecca McQuire Heath was nine months pregnant. In that same month, she was kidnapped from her home in Russell County, Alabama, and executed by a single gunshot wound to her head. Her body was discovered in Troup County, Georgia. Her executioners had been hired by her husband, the defendant, for the sum of $2000.

The defendant was indicted for murder during a kidnapping in the first degree in violation of Section 13A-5-40(a)(1), Code of Alabama 1975. At the guilt-finding phase of his trial, a jury found the defendant guilty as charged in the indictment. At the sentence-determining phase, the jury fixed the defendant's punishment at death. The trial judge then held the hearing mandated by Sec-

tion 13A-5-47, found that the aggravating circumstance outweighed the mitigating circumstance and sentenced the defendant to death. The written findings of the trial court are attached to this opinion as Exhibit A. The trial and sentencing proceedings were conducted in accordance with *Beck v. State*, 396 So.2d 645 (Ala. 1981), and *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). One issue is presented on appeal.

I

The defendant's sole contention on appeal is that his pleas of autrefois convict and former jeopardy were due to be granted. The defendant pled guilty to his wife's murder before the Superior Court of Troup County, Georgia, in February of 1982. He was sentenced to life imprisonment. The defendant argues that this prior Georgia conviction should have barred his subsequent trial and conviction in Alabama for the same criminal conduct.

The double jeopardy clauses of both the Fifth Amendment to the Constitution of the United States and Section 9, Art. I, of the Alabama Constitution, provide that no person shall "for the same offense" be twice put in jeopardy of life or limb. Consequently,

> "A plea of former jeopardy is unavailing unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea. And this is true even if both cases are founded on the same facts but the crimes charged were not the same in law." *Racine v. State*, 291 Ala. 684, 687 286 So.2d 896 (1973).

The doctrine of dual sovereignty provides that, "in the absence of a statute, the rule against double jeopardy applies only to offenses against the same sovereignty." 22 C.J.S. *Criminal Law*, Section 296 (1961). *Barnett v. State*, 373 So.2d 1226 (Ala.Cr. App. 1979), cert. denied, 373 So.2d 1230 (Ala.1980). The United States Supreme Court has recognized this doctrine in holding that a single

act may constitute an offense against both state and federal governments and that the offender may be prosecuted by both governments. *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). Also recognizing the principle that a person convicted in a state court may subsequently be prosecuted for the same act in federal court are *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978); *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed.2d 435 (1970), rehearing denied, 398 U.S. 914, 90 S.Ct. 1684, 26 L.Ed.2d 79 (1970); *United States v. NG*, 699 F.2d 63 (2nd Cir.1983); *Pope v. Thone*, 671, F.2d 298 (8th Cir. 1982), cert. denied, 457 U.S. 1140, 102 S.Ct. 2974, 73 L.Ed.2d 1360 (1982); *Brown v. United States*, 551 F.2d 619 (5th Cir.1977).

We have been cited to no federal case involving jeopardy and multiple state prosecutions. However, the courts of various states have recognized that a single act may constitute offenses against two different states and therefore prosecution in both states is constitutionally permissible under the principle of dual sovereignty. *People v. Walker*, 123 Cal.App. 3d 981, 177 Cal.Rptr. 147 (1981); *State v. Booth*, 418 So.2d 385 (Fla.App.1982); *State v. Brown*, 2 Ohio App.3d 321, 441 N.E.2d 1126 (1981); *State v. Straw*, 626 S.W.2d 286 (Tenn.Cr. App. 1981); *State v. Glover*, 500 S.W.2d 271 (Mo.App.1973).

In *Hare v. State*, 387 So.2d 299, 300 (Ala.Cr.App. 1980), this Court held that such dual prosecutions are permitted.

> "'A conviction in one state for an act in violation of its laws is not a bar to a prosecution in another for the same act, if it violates the laws of the latter state, unless it is otherwise provided by statute, or unless by compact between the states it has been agreed that the jurisdiction shall vest exclusively in the state first apprehending and arresting accused.' 22 C.J.S. Criminal Law, Section 296(c) (1961)."

In the absence of any statutory exception to the dual sovereignty doctrine, see *Barnett*, supra, we adhere to the principle stated in *Hare*, supra, and find no error in the denial of the defendant's pleas of former jeopardy.

II

We have fulfilled our statutory duty and searched the record for error affecting any substantial right of the defendant but have found none. Alabama Code Section 12-22-241 (1975); A.R.A.P. 45A.

We now review the propriety of the death sentence as required by Section 13A-5-53, Code of Alabama 1975. We have reviewed the sentencing proceedings and find therein no error adversely affecting the rights of the defendant. The trial court's finding of the aggravating and mitigating circumstances is supported by the evidence. The only aggravating circumstance relied on (the capital offense was committed while the defendant was an accomplice in the commission of a kidnapping, Section 13A-5-49(4)) was established by the verdict of conviction itself. This was proper under Section 13A-5-50, Code of Alabama 1975.

Explicitly addressing each of the three questions specified in Section 13A-5-53(b), we find that death is the proper sentence in this case.

(1) Under Section 13A-5-53(b)(1), there is no evidence that the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor. The trial court instructed the jury in its oral charge in the sentencing hearing not to let any sympathy, bias, passion, or prejudice affect their deliberations or sentence verdict. In the absence of any evidence to the contrary, we must assume that the jurors followed these instructions. *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 853, n. 6, 74 L.Ed.2d 646 (U.S.1983); *Parker v. Randolph*, 442 U.S. 62, 73, 99 S.Ct. 2132, 2139, 60 L.Ed.2d 713 (1979).

(2) Our independent weighing of the aggravating and mitigating circumstances required by Section 13A-5-53

(b)(2) indicates that death is the proper sentence. The record discloses the chronicle of a murder deliberately planned and engineered. The defendant overcame every obstacle in his path to insure the consummation of his wicked scheme. In consideration of the evidence presented, we do not see how the jury could have returned any verdict but that of guilty with a punishment of death.

In consideration of the third factor in determining whether the death sentence was proper, Section 13A-5-53 (b)(3), we find that the sentence of death is neither excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. See *Williamson v. State*, 370 So.2d 1054 (Ala.Cr. App.1978), affirmed, 370 So.2d 1066 (Ala.1979), vacated and remanded on other grounds, 448 U.S. 903, 100 S.Ct. 3042, 65 L.Ed.2d 1132 (1980).

In reviewing this factor, we have considered the punishments and convictions of the defendant's accomplices in the State of Georgia. Each accomplice was indicted for murder during kidnapping first degree. The defendant's girlfriend, Denise Paige Lambert, pled guilty to conspiracy to commit murder and was sentenced to ten years' imprisonment. Sanders Williams, who was hired to commit the murder but disappeared after several attempts "fell through", also pled guilty to conspiracy to commit murder and received a ten-year sentence.

Jerry Heath, the defendant's brother, who allegedly furnished the defendant with the name of someone who would commit the murder, was tried and acquitted. The two hired assassins, Charles Edward Owens and Gregory Hughes Lumpkin, were convicted of murder and received life sentences.

Our review of the entire record convinces us that the judgment of the circuit court is due to be and it is hereby affirmed.

AFFIRMED.

All Judges concur.

EXHIBIT A

IN THE CIRCUIT COURT OF
RUSSELL COUNTY, ALABAMA

Criminal Action No. CC 82-392

STATE OF ALABAMA, PLAINTIFF

vs.

LARRY GENE HEATH, DEFENDANT

DETERMINATION OF SENTENCE BY THE COURT

The defendant herein, with assistance of counsel at all proceedings, was found guilty as charged in the indictment. Thereafter a sentence hearing with participation by the same jury as at trial was held. Pursuant to Section 13A-5-47, Code of Alabama 1975, the Court makes the following findings of fact summarizing the crime herein and the defendant's participation in the crime:

FINDINGS OF FACT

GUILT PHASE

In early August, 1982 defendant contacted his brother, Jerry Heath, and Jerry Heath set up a meeting at which he, defendant, and Ricky Heath, another brother of defendant, discussed defendant's intentions to kill his wife, Rebecca Heath. Defendant gave Ricky Heath $40.00 for his expenses toward accomplishing that result; however, nothing developed from this meeting.

Defendant thereupon contacted Jerry Heath a second time. Jerry Heath told defendant he knew somebody else

that might commit murder. Subsequently Jerry Heath told defendant to meet a person at an apartment in Columbus, Georgia. This person was Charles Edward Owens. Sometime later Owens and two other men, Gregory Hughes Lumpkin and Sanders Williams, went to defendant's place of employment. There defendant discussed with Williams the details of his plans. Defendant wanted the homicide to appear to be an accident. Defendant paid Williams $100.00 as a down payment. Later that day defendant went to Owens' apartment and gave a pistol to Williams. Defendant planned for Williams to force his way into Rebecca Heath's car while she took defendant to work. Williams was then to kill Rebecca Heath and make her death appear to be accidental. The next day defendant gave Owens another $300.00, so that they could obtain an automobile to carry out the plan.

Nothing materialized from this plan, and several days later Owens told defendant Williams had left and his whereabouts were unknown. Owens stated to defendant that he and his partner, Gregory Hughes Lumpkin, would do the job for defendant. Approximately two days later, on August 31, 1981, at about 2:00 A.M., Owens called defendant at defendant's home and said that he and Lumpkin were prepared for the job. At 6:00 A.M. defendant locked and left his house. Before leaving he put a brick in his car which was also used by his wife. The brick was to be placed on the accelerator in carrying out the appearances of an accident. He also left a piece of wiring in the car to tie down the steering wheel.

Defendant went to Owens' apartment and explained how he wanted the act done. Defendant then went to the apartment of his girlfriend, Denise Lambert, and waited for a call from Owens. After receiving the call, defendant went to a service station in Columbus, Georgia, and turned over his automobile, a 1978 green Oldsmobile, to Lumpkin. Owens was also present, driving a white Mustang.

Defendant and Denise Lambert, driving Lambert's truck, led Owens and Lumpkin to Russell County, Alabama. On the road leading to his house, defendant stopped and pointed out the house to Lumpkin. Defendant then left as Owens pulled up beside Lumpkin. Defendant had left his house keys on the key ring with his car keys, so that Lumpkin had the keys to the house. The evidence indicates that Rebecca Heath was in her home when defendant pointed out his house to Owens and Lumpkin. At 9:10 A.M. that same morning defendant's car was seen a short distance off the road known as Smokey Road in Troup County, Georgia. A light-colored Mustang was seen sideways in the road one hundred yards from defendant's automobile. It then went down the road at a high rate of speed.

The body of Rebecca Heath was found at approximately 11:00 A.M. She was dead, having suffered a fatal gunshot wound through the right eye and into the brain. She was nine months pregnant.

In August, 1981 defendant borrowed $2,500.00 from Southern Discount Company. Rebecca Heath was a cosigner of this loan. $500.00 of this loan was used by defendant to build concrete pads for his dog pen. Thereafter defendant formed the intention to use the balance of $2,000.00 to pay for the murder of his wife. This sum of money was used for that purpose.

Rebecca Heath was forcibly abducted from her home in Russell County, Alabama, for the purpose of inflicting sufficient physical injury to her to cause her death. There is no evidence to suggest that at any time she was armed with any weapon. There is no evidence to indicate that the killing of Rebecca Heath was a justifiable or excusable homicide.

Defendant states that he formed the intention and plan to murder his wife because he was under the influence of extreme mental and emotional disturbance based upon his belief that his wife was engaged in an extra-

marital affair with another man and was pregnant by that man.

The Court finds that defendant initiated, procured, aided and abetted, and planned the abduction of Rebecca Heath so that she could be murdered. Defendant intentionally hired others with whom he was acting in complicity to intentionally abduct Rebecca Heath and to intentionally murder the said Rebecca Heath.

FINDINGS FROM SENTENCING PHASE

After the trial a sentence hearing was conducted with participation by the jury. The state rested upon the evidence brought forth at trial. The defendant presented evidence by witnesses called to testify. Arguments were made to the jury by both sides. The jury deliberated after being charged by the Court and unanimously returned a recommendation that defendant's punishment be death.

The Court ordered the probation officer for this circuit to prepare a written presentence investigation report. This report was duly prepared and filed. Copies of the same were furnished to counsel for both parties. A hearing was held for the parties to respond to the report and to present evidence about any part of the report which would be the subject of a factual dispute. At this hearing the state presented no further evidence. The defendant testified and gave evidence disputing certain matters in the presentence investigation report. The defendant also stated that he did have remorse for the killing of his wife, Rebecca Heath.

The Court finds from the evidence presented in this case that the defendant was guilty and is guilty of the murder of Rebecca Heath during a kidnapping in the first degree of the said Rebecca Heath.

The Court finds the following aggravating circumstance to exist in this case: The capital offense was committed while the defendant was engaged in the commission of a kidnapping.

The Court finds that the following aggravating circumstances do not exist in this case:

A. The capital offense was committed by a person under sentence of imprisonment.

B. The defendant was previously convicted of another capital felony or a felony involving the use of threat of violence to the person.

C. The defendant knowingly created a great risk of death to many persons.

D. The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

E. The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, or burglary.

F. The capital offense was committed for pecuniary gain.

G. The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

H. The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.

Upon consideration of all of the evidence brought forth at the trial in this case, the sentence hearings, and the presentence investigation report, the Court finds that the following mitigating circumstances exists in this case: Defendant was convicted of the murder of Rebecca Heath in the Superior Court of Troup County, Georgia, on February 10, 1982, and received a sentence of life imprisonment in that court.

The Court finds that the following mitigating circumstances do not exist in this case:

A. The defendant has no significant history of prior criminal activity. The Court finds that the defendant

does have a significant history of prior criminal activity in that before the sentence hearing in this case he was convicted of three felony offenses, those being buying, receiving or concealing stolen property, forgery, and a criminal attempt of theft by extortion.

B. The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

C. The victim was a participant in the defendant's conduct or consented to it.

D. The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor.

E. The defendant acted under extreme duress or under the substantial domination of another person.

F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law were substantially impaired.

G. The age of the defendant at the time of the crime.

H. Any other mitigating circumstances offered pursuant to Section 13A-5-52, Code of Alabama 1975.

Upon considering and weighing the aggravating circumstance with the mitigating circumstances in this case, the Court is of the opinion that the aggravating circumstance outweighs any mitigating circumstances. It is, therefore,

ORDERED AND ADJUDGED BY THE COURT that the defendant be sentenced to death by electrocution as specified in the laws of this state and as set forth in an order of sentence by this Court.

DONE this the 10th day of February 1983.

Wayne T. Johnson

Circuit Judge

ORDER OF SENTENCING

This case is now before the Court for sentencing. The State is represented by its district attorney and the defendant is present in open court with his counsel, Larry W. Roney, Esq., and R. Michael Raiford, Esq. The Court has previously conducted a sentence hearing with participation by the jury and a hearing for the parties to present evidence regarding matters in the contents of the presentence report and for arguments to be made regarding the proper sentence in this case. The defendant, Larry Gene Heath, being asked by the Court if he has anything to say as to why the sentence of the Court should not be pronounced or before sentence is pronounced says proceedings violate the 5th Amendment and laws of this state.

Upon jury verdict of guilty of murder during kidnapping in the first degree, the Court adjudges the defendant guilty of murder during kidnapping in the first degree, that is, that Larry Gene Heath did intentionally cause the death of Rebecca Heath by shooting her with a pistol, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath, with the intent to inflict physical injury upon her, in violation of Section 13A-5-40(a)(1) of the Code of Alabama 1975, as amended. Upon consideration of the evidence in this case, the matters brought forth in the sentence hearing, and upon consideration of the aggravating and mitigating circumstances in this case, the Court finds that the aggravating circumstances outweighs any mitigating circumstances.

It is, therefore,

ORDERED BY THE COURT that the punishment in this case is fixed at death.

IT IS ORDERED BY THE COURT that the defendant, Larry Gene Heath, be sentenced to death by electrocution on the 17th day of March, 1983.

The Sheriff of Russell County, Alabama, shall deliver the said Larry Gene Heath to the custody of the Warden of the William C. Holman unit of the state prison system at Atmore, Alabama, together with a warrant from the clerk of this court as set forth hereafter.

The executioner designated by the laws of this state, at the proper place specified by law for the execution of one sentenced to death, shall cause a current of electricity of sufficient intensity to cause death to pass through the body of the defendant, with such current of electricity to be applied and to continue until the defendant, Larry Gene Heath, is dead.

The clerk of this court is ordered to issue a warrant under the Seal of this Court directed to the warden of William C. Holman unit of the state prison system at Atmore, Alabama, for the execution of the sentence of death, which warrant shall recite the fact of conviction and shall set forth specifically the offense, the judgment of the Court, and the time fixed for defendant's execution. Said warrant shall command the warden to proceed at the time and place named in the sentence to carry the same into execution as provided in Section 15-18-82, Code of Alabama 1975. The clerk shall deliver said warrant to the Sheriff of Russell County, Alabama, who shall deliver the same, together with the defendant, Larry Gene Heath, to said warden.

Pursuant to Section 13A-5-55, the judgment of conviction is subject to automatic review. Notice of appeal is entered and the sentence herein is suspended, pending appeal.

DONE this the 10th day of February, 1983.

/s/ Wayne T. Johnson

Circuit Judge

IN THE SUPREME COURT
OF ALABAMA

Sup. Ct. No. 1060

LARRY GENE HEATH

vs.

STATE OF ALABAMA

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF ALABAMA.

Comes now the Petitioner, Larry Gene Heath, by and through his attorney of record, and respectfully petitions this Honorable Court to review and to reverse the decision and judgment of the Court of Criminal Appeals of Alabama rendered in the above styled cause on July 5, 1983, affirming the judgment of conviction had in the Circuit Court of Russell County, Alabama.

Petitioner avers that he has duly filed an Application For Rehearing in the Court of Criminal Appeals of Alabama in this cause within the time required by law, raising the points hereinafter set forth, and that said Application For Rehearing was overruled on August 2, 1983.

As grounds for this Petition For Writ of Certiorari to the Court of Criminal Appeals the Petitioner sets forth and assigns the following, separately and severally:

The basis of this Petition For Writ of Certiorari is as follows: The Court of Criminal Appeals affirmed the judgment of conviction had in the Circuit Court of Russell County, Alabama, when in fact the record affirmatively shows that Petitioner was convicted in the State of Georgia and in the State of Alabama for the same offense, which is percisely the same in law and fact and that a decision is needed by this Court as to whether or not the prosecution in the State of Alabama constituted double jeopardy in violation of the 5th Amendment of the United States Constitution.

WHEREFORE, THESE PREMISES CONSIDERED, Petitioner urges that a Writ of Certiorari be isued from this Court to the Court of Criminal Appeals and that this Court proceed to review and correct the errors complained of and to reverse the judgment of the Court of Criminal Appeals affirming the judgment of conviction had in the Circuit Court of Russell County, Alabama and render such judgment as said Court should have rendered in addition to such other relief as Petitioner may be entitled.

DATED: August 10, 1983

Respectfully submitted,
LARRY W. RONEY
Attorney at Law, P.C.

/s/ Larry W. Roney
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Phenix City, Alabama
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Attorney for Petitioner

[Supporting documents omitted; certificate of service omitted]

• • • •

THE SUPREME COURT OF ALABAMA

No. 82-1060

EX PARTE LARRY GENE HEATH

(RE LARRY GENE HEATH

v.

STATE OF ALABAMA)

July 6, 1984

Larry W. Roney, Phenix City, for petitioner.

Charles A. Graddick, Atty. Gen., and William D. Little, Asst. Atty. Gen., for respondent.

OPINION OF THE COURT

FAULKNER, Justice.

The petitioner was convicted of murder during a kidnapping in violation of § 13A-5-40(a)(1), Code of Alabama, and was sentenced to die. The Court of Criminal Appeals reviewed the petitioner's conviction and, after independently determining that the death penalty was appropriate, affirmed his conviction and sentence. *Heath v. State*, 455 So.2d 898 (Ala.Crim.App. 1983). We granted certiorari pursuant to A.R.A.P. 39(c).

The facts are set out in detail in exhibit A as to the opinion of the Court of Criminal Appeals. In short, Heath

hired two men to abduct and murder his wife. After she was kidnapped and shot, her abductors abandoned her body in Georgia. Heath pleaded guilty to murder charges brought in Georgia and was sentenced to life in prison.

In his appeal to the Court of Criminal Appeals and in his petition to this Court, Heath raised only one issue, whether Alabama was probihited by the double jeopardy provisions of the United States and the Alabama Constitutions from prosecuting Heath for his wife's murder after his murder conviction in Georgia arising out of the same incident. United States Constitution, Amendment V.; Alabama Constitution Art. 1, § 9.

We agree with the Court of Criminal Appeals that the Double Jeopardy Clause of the Fifth Amendment and the double jeopardy clause of the Alabama Constitution each applies only to offenses against the same sovereign and, therefore, that the subsequent prosecution in Alabama was not barred. Prosecutions under the laws of separate sovereigns do not improperly subject an accused twice to prosecutions for the same offense. *United States v. Wheeler*, 435 U.S. 313, 317, 98 S.Ct. 1079, 1082, 55 L.Ed. 2d 303 (1978). Thus, a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts on which the federal prosecution was based; nor does a prior state prosecution bar a federal one. *Abbate v. United States*, 359 U.S. 187, 79 S.Ct. 666, 3 L.Ed.2d 729 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). As the Supreme Court stated in *United States v. Wheeler*, 435 U.S. at 320, 98 S.Ct. at 1084:

> "*Bartkus* and *Abbate* rest on the basic structure of our federal system, in which States and the National Government are separate political communities. State and Federal Governments '[derive] power from different sources,' each from the organic law that established it. *United States v. Lanza*, 260 U.S. 377, 382 [43 S.Ct. 141, 142, 67 L.Ed.2d 314]. Each

> has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, not that of the other.' Ibid. And while the States, as well as the Federal Government, are subject to the overriding requirements of the Federal Constitution, and the Supremacy Clause gives Congress within its sphere the power to enact laws superseding conflicting laws of the States, this degree of federal control over the exercise of state governmental power does not detract from the fact that it is a State's own sovereignty which is the origin of its power."

The Supreme Court has never considered the question of the applicability, *vel non*, of the "dual sovereignty" doctrine to consecutive prosecutions by two states. It is clear that the "dual sovereignty" concept does not apply in every instance where successive cases are brought by separate entities. For instance, a state and a municipal subdivision of the same state cannot bring successive prosecutions for offenses arising out of the same conduct. *Waller v. Florida*, 397 U.S. 387, 90 S.Ct. 1184, 25 L.Ed. 2d 435 (1970). The states of Alabama and Georgia are clearly separate political sovereignties, however. If, for double jeopardy purposes, Alabama is considered to be a sovereign entity vis-a-vis the federal government then surely it is a sovereign entity vis-a-vis the state of Georgia.

Alabama may choose not to prosecute individuals in situations like the one at bar where the defendant has been convicted of a serious offense and has received a substantial sentence in another state for an offense arising out of an act punishable under Alabama law. Such an exercise of prosecutorial restraint is not constitutionally mandated, however, and we decline to impose such a policy judicially under the guise of a constitutional pronouncement. See *Booth v. State*, 436 So.2d 36 (Fla.

1983). Such a rule would have the undesirable effect of depriving Alabama of the right to enforce its own laws in instances where another state has prosecuted an individual for an offense arising out of the transaction in question, even where the prosecution in another state is for a relatively minor offense.

After reviewing the record and considering the petition, the arguments of the parties, and the opinion of the Court of Criminal Appeals, we are of the opinion that the judgment below affirming the conviction and death sentence is due to be affirmed.

AFFIRMED.

TORBERT, C.J., and MADDOX, JONES, ALMON, SHORES, EMBRY, BEATTY, and ADAMS, JJ., concur.

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SUPREME COURT OF THE UNITED STATES

No. 84-5555

LARRY GENE HEATH, PETITIONER

v.

ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ALABAMA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to Question II.

In addition, the parties are requested to address the following question:

'What is the applicability, if any, of the dual sovereignty doctrine to successive prosecution by two different states?'

Justice Powell took no part in the consideration or decision of this motion and this petition.

March 4, 1985

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No. 84-5555

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Alabama

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

(1) Was the prohibition of double jeopardy violated when Alabama tried, convicted, and sentenced Mr. Larry Heath to death for a murder that occurred in Georgia, where virtually all relevant activity occurred in Georgia, and where Georgia had previously placed Mr. Heath in jeopardy of his life, and convicted him of the same murder, and had sentenced him to life imprisonment?

(2) Is the dual sovereignty exception to the double jeopardy prohibition applicable to successive prosecutions of the same offense by two different states?

(3) If the dual sovereignty exception is to be applied to successive state prosecutions, should it be interpreted to allow multiple prosecutions based on identical conduct under virtually indistinguishable statutes serving identical interests?

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M. Gelfand, *A Nation of Cities* (1975)	28
W. LaFave & A. Scott, *Handbook on Criminal Law* (1972)	36
L. Miller, *Double Jeopardy and the Federal System* (1968)	18, 19, 23
J. Story, *Conflicts of Law* (1834)	40
Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306 (1963)	25
21 Am. Jur. 2d *Criminal Law* § 257 (1981)	20
1 *Annals of Cong.* 753 (J. Gales ed. 1789)	23
United States Attorney's Manual § 9-2.142 (January 3, 1980 revision)	26
Model Penal Code § 1.10 (Proposed Official Draft) (1962)	19
State of Alabama, *Brief in Opposition to Certiorari*	9, 13

This Court having granted a writ of certiorari to review the judgment and opinion of the Supreme Court of Alabama entered in this proceeding on July 6, 1984, Petitioner, Larry Gene Heath, prays that the judgment affirming his conviction and death sentence be reversed.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported in *Ex Parte Larry Gene Heath*, 455 So. 2d 905 (Ala. 1984) and is set forth in the Joint Appendix. Also set forth in the Joint Appendix is the earlier opinion of the Alabama Court of Criminal Appeals, affirmed by the Supreme Court of Alabama, which is reported in *Larry Gene Heath* v. *State*, 405 So. 2d 898 (Ala. Crim. App. 1383). The Determination of Sentence by the Trial court of the Superior Court of Russell County, Alabama, February 10, 1983, is reported as an appendix to the opinion of the Alabama Court of Criminal Appeals.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Alabama was entered on July 6, 1984. *Ex Parte Larry Gene Heath*, 455 So. 2d 905 (Ala. 1984).

The petition for a writ of certiorari was timely filed within the extended period for filing on October 4, 1984. This Court's jurisdiction is properly invoked under 28 U.S.C. § 1257(3)(1976). The petition for a writ of certiorari was granted on March 4, 1985.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions involved are set out in Appendix A:

United States Constitution, Fifth Amendment.

United States Constitution, Fourteenth Amendment, Section one.

Alabama Code § 13A-5-40 (1981).

Alabama Code § 13A-5-45 (1981).

Alabama Code § 13A-5-49 (1981).

Alabama Code § 13A-5-50 (1981).

Alabama Code § 13A-6-2 (1977).

Alabama Code § 13A-6-43 (1977).

Alabama Code § 15-2-3 (1940).

Georgia Code § 26-1101 (1968).

Georgia Code § 27-2528 (1973).

Georgia Code § 27-2534.1 (1973).

STATEMENT OF THE CASE

On August 31, 1981, the body of Mrs. Rebecca Heath was discovered in the back seat of an automobile off the side of Smokey Road, in Troup County, Georgia. Mrs. Heath had lived with her husband, petitioner Mr. Larry Heath, in Russell County, Alabama, which is just across the Chattahoochee River from Chattahoochee County, Georgia.

After a joint investigation by the law enforcement authorities of Troup County and Russell County, a grand jury was empaneled in Troup County, regarding Mrs. Heath's death. (T.R. at 361-63, 366-67, 372, 381, 383-85, 386-90, 398-99.) On November 3, 1981, the grand jury returned indictments for murder, Ga. Code § 26-1101 (1968), (App. A at 8a) against Mr. Larry Heath and five other persons. The indictment alleged that "on the date of August 31, 1981, in the county aforesaid, [the six named persons] did then and there unlawfully and with malice aforethought cause the death of Rebecca McGuire Heath, a human being, by shooting her with a gun, a deadly weapon." (J.A. at 4, T.R. at 740). On November 3, 1981, the state of Georgia also served notice of an aggravating circumstance on Mr. Heath, thereby informing him that it would seek the death penalty. (J.A. at 5; T.R. at 742). Ga. Code § 27-2534.1(b)(6) (1973). (App. A at 9a.) On February 10, 1982, in

the Superior Court of Troup County, Georgia, Mr. Heath pleaded guilty to the murder charge. (J.A. at 6; T.R. at 744.) Ga. Code § 26-1101 (1968). (App. A at 8a.) Mr. Heath received a sentence of imprisonment for life. Ga. Code § 27-2528 (1973). (App. A. at 8a.) (J.A. at 6, T.R. at 744.)

On April 28, 1982, Mr. Heath was called to testify by the state of Georgia at the trial in Troup County of Charles Edward Owens and Gregory Hughes Lumpkin for the murder of Rebecca Heath. Mr. Heath refused to testify, asserting his fifth amendment privilege, citing the possibility that the state of Alabama might charge him with kidnapping his wife. (J.A. at 47-48, T.R. at 550-51.)

Seven days after Mr. Heath refused to testify in Georgia, on May 5, 1982, a grand jury was empaneled in Russell County, Alabama, and returned an indictment for the murder during a kidnapping of Rebecca Heath against Mr. Larry Heath. Ala. Code § 13A-5-40(a)(1) (1981). (App. A at 1a.) The indictment did not allege any place of commission of the crime. (J.A. at 7, T.R. at 728.)

On November 2, 1982, in the Superior Court of Russell County, Alabama, Mr. Heath entered pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions, on the basis that he had already been indicted, found guilty, and was serving a sentence for the murder of Rebecca Heath. (J.A. at 8, 10, T.R. at 735-36, 745-46.) Two days later, Mr. Heath also entered a plea to the territorial jurisdiction of the Alabama court, on the basis that the alleged crime occurred in Troup County, Georgia. (T.R. at 763.) The trial judge rejected the pleas of autrefois convict and former jeopardy on December 10, 1982. (J.A. at 12-14; T.R. At 774-76.) A ruling on the plea to jurisdiction was postponed until the close of the state's case-in-chief. (T.R. at 778.)

On January 10-12, 1983, the state of Alabama tried Mr. Heath for the murder during a kidnapping of Rebecca Heath. At the close of the state's case, the defense argued its plea to jurisdiction should be granted because there had been no evi-

dence of any kidnapping, and because all of the evidence showed that Mrs. Heath was killed in Troup County, Georgia. (J.A. at 54-57; T.R. at 587-89.) The state argued that there had been a kidnapping, and that under Alabama law, where an offense "commences" in Alabama, it may be punished in Alabama, no matter where the offense was consummated. Ala. Code § 15-2-3 (1940). (App. A at 7a.) (J.A. at 56-57, T.R. at 589-90.) The state did not even suggest that the killing had occurred in Georgia. The trial judge rejected the plea to jurisdiction, without explanation. (J.A. at 57, T.R. at 590.) He also again rejected the pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions, which Mr. Heath had once more raised. (J.A. at 57, T.R. at 590.)

In closing argument, the prosecution told the jury that under Alabama law "if they took her to Tennessee or to New York or California or even the moon before they killed her, it makes no difference . . ." because the crime "commenced" in Russell County (J.A. at 58, T.R. at 610-11.) The jury was not instructed that it had to make any finding as to where the killing occurred. (J.A. at 60, T.R. at 637.)

On January 12, 1983, the jury found Mr. Heath guilty of murder during a kidnapping. Ala. Code § 13A-5-40(a)(1) (1981). (App. A at 1a.) (J.A. at 61, T.R. 647-48.) The next day, the jury returned an advisory verdict of death. (J.A. at 62; T.R. at 697.) On February 10, 1983, the trial judge sentenced Mr. Larry Heath to death, finding as the sole aggravating circumstance that the "capital offense" of "murder during a kidnapping" Ala. Code § 13A-5-40(a)(1)(1981)(App. A at 1a), was "committed while the defendant was engaged in the commission of a kidnapping." Ala. Code § 13A-5-49(4) (1981) (App. A at 5a). (J.A. at 65-68, T.R. At 718-21.)

On Appeal, on July 5, 1983, the Alabama Court of Criminal Appeals rejected Mr. Heath's pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions. (Opinion at J.A. at 78.) The Supreme Court of

Alabama granted a petition for a writ of certiorari, but on July 6, 1984, the court rejected Mr. Heath's pleas of autrefois convict and former jeopardy under the Alabama and United States constitutions. (Opinion at J.A. at 93.)

SUMMARY OF THE ARGUMENT

Mr. Heath was prosecuted twice for the same murder in violation of the double jeopardy clause. The two prosecutions were for the "same offense" as determined by reference to any test that this Court has ever suggested is relevant to such a determination. The only significant difference between the prosecutions was the respective aggravating circumstance relied on in the successive prosecutions. Aggravating circumstances are not elements of the offense for double jeopardy purposes; if they were, a state could try an individual a multitude of times for the same capital murder.

Virtually all of the relevant activity, including the murder, occurred in Georgia, and the state of Alabama has conceded as much. When the state with the closest nexus to a capital offense puts a person in jeopardy of his life for that offense, a subsequent prosecution for the same capital offense violates double jeopardy. The dual sovereignty exception is not applicable in such a case because it is only implicated where there is concurrent territorial jurisdiction. In this case, by contrast, Alabama is attempting to exercise extra-territorial jurisdiction.

The policies of the double jeopardy clause are grossly violated when an individual is subjected to repeated trials for his life based on the same offense. Not only is such an individual kept in endless anxiety about whether he will live or die, but there is also an intolerably increased risk of an erroneous death sentence being imposed. This country's abhorrence for such a practice is evidenced by the fact that diligent research has not turned up a single case where the same murder has formed the basis of two successive prosecutions.

The dual sovereignty exception does not save this conviction for another reason. That exception arose as a means of resolving potential inter-governmental conflict where (1) there is overlapping territorial jurisdiction (2) of governmental entities generally pursuing different interests (3) that generates a serious risk of inter-governmental conflict (4) and where multiple prosecutions are necessary for the satisfaction of both governments' interests. None of these conditions are present in the context of successive state prosecutions for the same offense.

The conclusion that the dual sovereignty exception does not save this conviction is confirmed by this Court's analysis of sovereignty. "Sovereignty" has been used to describe an analysis of the issues underlying governmental relationships. Only when those relationships require two prosecutions has this Court interpreted the double jeopardy clause to allow two prosecutions. This Court has never interpreted the double jeopardy clause to allow more than two prosecutions for the same offense. Affirming Mr. Heath's conviction on the basis of the dual sovereignty exception would result in the possibility of multiple, not just two, trials, convictions and punishments.

Alabama's legitimate law enforcement interests will not be thwarted by not applying the dual sovereignty exception to allow successive state prosecutions for the same offense. The Georgia prosecution satisfied the societal interests in deterring and punishing murders. Moreover, Alabama is free to prosecute for kidnapping or any other different offense done within its borders.

Should this Court apply the dual sovereignty exception to successive state prosecutions for the same offense, that exception should not apply where an individual is prosecuted under virtually indistinguishable statutes serving identical social interests.

ARGUMENT

I

DOUBLE JEOPARDY WAS VIOLATED WHEN ALABAMA TRIED, CONVICTED AND SENTENCED MR. HEATH TO DEATH FOR A MURDER THAT OCCURRED IN GEORGIA, WHERE VIRTUALLY ALL THE RELEVANT ACTIVITY OCCURRED IN GEORGIA, AND WHERE GEORGIA HAD PREVIOUSLY PLACED MR. HEATH IN JEOPARDY OF HIS LIFE, HAD CONVICTED HIM OF THE SAME MURDER, AND HAD SENTENCED HIM TO LIFE IMPRISONMENT.

A. Mr. Heath Was Placed In Jeopardy Of His Life Twice By Successive Prosecutions For The "Same Offense" Of Murder By The States Of Georgia And Alabama In Violation Of The Double Jeopardy Clause.[1]

That Mr. Heath was tried twice for the same offense seems beyond dispute. He has been convicted twice for the murder of the same human being. Moreover, the evidence employed to prove the state's case in Alabama—the testimony resulting from the joint investigation by Georgia and Alabama officials (T.R. at 361-63; 372-381, 383-90, 398-99)—is obviously the evidence that would have been relied upon by the state of Georgia had Mr. Heath not pleaded guilty in that state. Thus, regardless of the test employed to determine the meaning of the phrase "the same offense" for the purposes of the double jeopardy clause, Mr. Heath was twice convicted for the same offense. If the appropriate test is multiple trials and punishment for a single act, *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977), that test is obviously met here. If the test is whether the same evidence is employed to convict the defendant in the second prosecution, see *id.* at pp. 166-7n. 6; *Illinois* v. *Vitale*, 447 U.S. 410 (1980); then again that test is satisfied. A review of the

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[1] *Benton* v. *Maryland*, 395 U.S. 784 (1969) incorporated the double jeopardy prohibition of the fifth amendment into the due process clause of the fourteenth amendment.

relevant statutes and their interpretation demonstrates that "the same elements" test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), is also satisfied.

Mr. Heath was convicted of murder in violation of Ga. Code § 26-1101(a)(1968)(App. at 8a.) That section requires proof of an unlawful killing with malice aforethought, which is defined as a "deliberate intention." He was convicted in Alabama of murder during a kidnapping in violation of Ala. Code § 13A-5-40(a)(1)(1981) (App. A at 1a). Murder is defined in Ala. Code § 13A-6-2 (1977) (App. A at 6a) as causing the death of a person "with intent." The murder offenses in both states require an intentional killing of a human being, and are not different from one another in any manner significant to this litigation. Thus, the elements of the two statutes being virtually indistinguishable, the *Blockburger* "same elements" test is also satisfied.

There was a difference in the aggravating circumstances relied upon in the two states, but that is merely a matter of sentencing and does not go to the elements of the respective offenses. In Georgia, Ga. Code § 26-1101(c)(1981) (App. A at 8a) makes murder a capital offense and Georgia Code § 27-2534.1(1973) (App. A at 9a) describes the circumstances which permit the imposition of the death penalty.

Essentially the same statutory scheme exists in Alabama. Murder is defined in Ala. Code § 13A-6-2 (1977). (App A at 6a.) Subsection (c) of this section makes murder a capital offense if committed under aggravated circumstances "as provided in article 2 of chapter 5," the relevant provision of which is Ala. Code 13A-5-40 (1981)(App at 1a) (and is the section referred to in Mr. Heath's indictment). That section, in turn, is included in chapter 5 of the Alabama Criminal Code, which is entitled "Punishments and Sentences." Thus, as in Georgia, the offense of which Mr. Heath was convicted in Alabama was murder, and

as a matter of sentencing the state relied on the kidnapping to provide the necessary aggravating circumstance.[2]

According to the relevant state statutes, then, Mr. Heath was twice convicted for the same offense of murder. The statutes in both states require an intentional killing for conviction. Upon conviction, the death penalty may be imposed only upon

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[2] The state of Alabama in its Brief in Opposition to Certiorari at p. 6 asserts that: "Under Alabama law capital offenses such as kidnapping/murder consist of two element (sic) but not two different offenses. *Ex Parte Baldwin*, 372 So. 2d 32 (Ala. 1979)." *Baldwin* did make that statement, *Baldwin*, 372 So. 2d at 33. However, in 1979 Alabama's fourteen capital offenses were still interpreted as consisting of fourteen different elements plus an intentional killing as aggravation. *See, e.g., Clements* v. *State*, 370 So. 2d 723, 725-26 (Ala. 1979). The statute was later reinterpreted, because the Constitution requires an intentional killing to justify a death sentence. "In order for the death sentence to be imposed . . . an intentional killing with aggravation must be shown. . . . The capital offenses set forth in § 13-A-5-31 contain an 'intentional killing,' the gravamen, and aggravation." *Ex Parte Dobard*, 435 So. 2d 1338, 1359 (Ala. 1983). The aggravating circumstances are "elements" of the capital offense simply because the state has required them to be proven at trial. *Id.* at 1357-8; *Beck* v. *State*, 396 So. 2d 645, 663 (Ala. 1981).

These cases, including *Baldwin*, concern the immediate past Alabama capital offense statute. However, an examination of the present statute reveals no material change. In *Ex Parte Bush*, 431 So. 2d 563 (Ala. 1983), the court held that mistakenly citing the 1975 statute rather than the current code was a technical, harmless error. *Id.* at 564-65.

Alabama courts previously held that simultaneous use of an "element" of a capital offense as an aggravating circumstance constituted punishing a defendant twice for the same act. *See, e.g., Bufford* v. *State*, 382 So. 2d 1162, 1173-74 (Ala. Crim App.), *cert. denied*, 382 So. 2d 1175 (Ala. 1980). This line of cases is now held inapplicable precisely because the non-murder "element" of the capital offense is in reality an aggravating circumstance. *Dobard* v. *State*, 435 So. 2d 1338, 1344 (Ala. Crim. App. 1982), *aff'd.*, 435 So. 2d 1351, 1357-58 (Ala. 1983).

proof of aggravating circumstances. Those aggravating circumstances are not elements of the offense, however. They are sentencing criteria.

Any argument to the contrary must be unavailing. A state could not constitutionally make aggravating circumstances into elements of the offense of murder by making each form of aggravated homicide a separate offense. If that could be done, a state could try a defendant a multitude of times for the same murder, with each trial involving only one of the various relevant aggravating circumstances. The result would be a series of trials for the death of the same human being, differing from each other only by reference to some ancillary aggravating matter. Indeed, this is precisely what Georgia and Alabama have done in this case. They have tried Mr. Heath for the same offense twice, and have simply emphasized different sentencing matters.[3]

Surely the double jeopardy clause prohibits double trials for the same offense as occurred in the present case. If it does not, presumably Alabama (or Georgia or both states) can now retry Mr. Heath for the same murder by relying on yet another aggravating circumstance. If the concern that an individual not be subjected to multiple prosecutions for the same offense means anything, certainly it must not allow endless trials for the same offense that differ from each other only by reference to an ancillary matter of sentencing.

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[3] The tension this possibility creates with *Bullington* v. *Missouri*, 451 U.S. 430 (1980), and *Arizona* v. *Rumsey*, 140 S. Ct. 2305 (1984), demonstrates that states should not be allowed to evade those rulings by redefining aggravating circumstances as elements of an offense.

B. Mr. Heath's Double Jeopardy Rights Were Violated By Being Tried And Convicted In Alabama After Having Been Tried And Convicted For The Same Offense In Georgia Where The Murder And Virtually All The Relevant Activity Occurred In Georgia.

Although the trial record is not completely unequivocal about the matter, a review of the record demonstrates that the only reasonable conclusion is that the murder with which Mr. Heath has been charged twice occurred in Georgia. The state of Alabama has virtually conceded this point throughout this litigation. In addition, virtually all the relevant planning activity occurred in Georgia. Under these facts, where the state with the most intimate ties and nexus to the criminal act has exercised jurisdiction over that act, double jeopardy should bar another state from subsequently convicting the defendant of the same offense.

At Mr. Heath's trial in Alabama, the following evidence was introduced regarding where Rebecca Heath was killed. C. L. Hudson, a resident of Troup County, Georgia, was called by the prosecution and testified that at about 9:10 a.m., on August 31, 1981, he was traveling west in Troup County on Smokey Road toward Hamilton Road, when he saw a light-colored Mustang turn around or pull out of a spot off the road. At that spot, there was a green car pulled off into the edge of the woods. Mr. Hudson stopped and investigated. The green car was still running, and the windows were fogged on the inside, "apparently somebody was inside the car breathing. . . ." He saw no one in the front seat of the car. He saw only a single, bluejean-covered knee sticking up in the back seat. Mr. Hudson left the scene, figuring "it was a kid's car or it was kids in the back seat. . . ." (J.A. at 16-20; T.R. At 333-39.)

William V. Pruitt, a resident of Troup County, Georgia, was called by the prosecution and testified that at about 11:05 a.m. on August 31, 1981, he was traveling west on Smokey Road in Troup County. He saw a green Oldsmobile off the side of the road. Mr. Pruitt first drove past, then stopped, backed up, and walked to the Oldsmobile. The motor was not running, but was

warm. He saw a person lying in the back seat. The "person" appeared to have been sitting on the passenger side, and to have fallen over. He then went to his truck and radioed his dispatcher, who contacted the sheriff's department. Mr. Charles Donald Mallory, a Troup County investigator, was the officer who arrived. (J.A. at 21-23; T.R. at 339-45.)

Mr. Charles Donald Mallory, chief investigator for the Troup County Sheriff's Department, was called by the prosecution. He testified that he arrived at the scene at about 11:15 a.m. He saw a body lying on the back seat of the Oldsmobile. He attempted to find a pulse in the arm of the lady, but found none. He then attempted to find a pulse in her neck. He found no pulse, "/b/ut did notice at that time that the body was extremely warm, to the point of being wet under the neck with perspiration." The person had her purse and her shopping bag. Mr. Mallory stated that he observed spots of blood in the car on the rear floorboard and the edge of the front right seat. In cross-examination Mr. Mallory stated that the blood "was not smeared as it would be, say, putting a body in the car. It looked more just like splattered type blood or just dropped on there." He further stated that: "I estimated, just from my experience in dealing with deaths, that she probably had been dead no longer than a couple of hours." (J.A. 24-28; T.R. at 346-58.)

Prentiss L. Griffith, the Sheriff of Russell County, Alabama, was called by the prosecution. He testified on cross-examination that he guessed it was about 50 miles from the Russell courthouse (which was 3 and a half miles from the Heath residence) to where the body was found. He had never actually been to the site. (J.A. 29-32; T.R. at 363-4.)

Mr. Griffith's guess is a good approximation. A perusal of any map of Georgia and Alabama immediately reveals that the only plausible route to take from Russell County to the place the body was found would require crossing immediately into Georgia and driving for a considerable time in Georgia. In light of this, and given the testimony recited above, the inference is unavoidable that the victim was not killed in Alabama and

transported into Georgia. She was obviously killed at or near the spot where her body was found in Georgia.

The strength of that inference undoubtedly explains why the state of Alabama has never once throughout the course of this litigation contested it. For example, in Respondent's Brief In Opposition To Certiorari in this case, at p.6, the state of Alabama argued that it had jurisidiction of the murder by virtue of an Alabama statute that grants jurisdiction for an offense commenced in Alabama and consummated outside of the state. Because there has never been a dispute as to the place of the kidnapping, the state's reliance on this statute impliedly concedes that the murder occurred in some state other than Alabama. On pp. 6, 7 of that Brief, the state of Alabama relies on certain acts of Mr. Heath to justify its jurisdiction and then asserts, *id.* at p. 7: "Thus not only did at least one-half of the crime, the kidnapping element, occur in Alabama, but also the Petitioner's primary inculpatory acts took place there." Quite obviously the state is impliedly conceding that the killing took place somewhere else. In this respect the state has been consistent. In its opening (J.A. at 15; T.R. at 309-10) and closing to the jury (J.A. at 58-59; T.R. At 610-11, 629), in its arguments to the trial judge (J.A. at 56-57; T.R. at 589-90), and in the instructions to the jury (J.A. at 60; T.R. at 637) the same implied concession was made. It is now too late to hear the state of Alabama argue to the contrary. The evidence only supports, and Alabama has virtually conceded, that the murder occurred in Georgia.[4]

Not only was the killing done in Georgia, virtually all the related activity occurred there as well. Mr. William J. Mauleg,

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[4] After the joint investigation by the Georgia and Alabama authorities, the Troup County grand jury returned an indictment alleging that the crime had been committed in Troup County, Georgia. (J.A. at 4; T.R. at 740.) The Russell County grand jury did not allege any place of commission. (J.A. at 7; T.R. at 728). Since the locus of an offense is res judicata in a state's courts, the Full Faith and Credit Clause, U.S. Const. art. IV, § 1 should bar relitigation of that ques-

special agent of the Georgia Bureau of Investigation, was called by the prosecution. He read a statement which he testified had been made by Mr. Heath. In that statement, Mr. Heath allegedly said that two or three weeks before September 4, 1981, he discussed the possibility of murder with his brother Jerry. He met with his brothers Jerry and Ricky a short time later in Columbus, Georgia. Five hundred dollars was passed to Ricky Heath, who was to serve as a go-between, but nothing came of this. Jerry Heath finally told Mr. Larry Heath to go to an apartment building in Columbus, Georgia. He talked there with Charles Edward Owens, a week before August 31, 1981. Mr. Owens and two other persons met with Mr. Heath a couple days later outside the Banner Building in Columbus, Georgia, where Mr. Larry Heath worked. Later that same day Mr. Larry Heath again met with these men, in Owens' apartment in Columbus, Georgia. Rebecca Heath was to be kidnapped while in Georgia. The next day Mr. Larry Heath stopped by Owens' apartment, in Columbus, Georgia to "finalize everything." This was either August 25th or 26th, 1981. For two days Rebecca Heath went to LaGrange, Georgia, but nothing happened. (JA. at 42-43, T.R. at 543-45.)

Mr. Larry Heath contacted Mr. Owens. Owens said his partner had disappeared, but that he had gotten another from Benning Hills, Georgia. Owens called Mr. Heath at 2:00 a.m. on Monday morning, August 31, 1981. Mr. Heath told Owens to call him back at 9:00 a.m. at Mr. Heath's work in Columbus, Georgia. At 6:00 a.m. Mr. Heath left his home. His automobile had a brick and a wire in it at this time. He drove to Owens' apartment in Columbus, Georgia. he talked with him, and gave Mr. Owens the phone number of Denise Lambert, who lived in Columbus, Georgia. Mr. Heath drove to the Lambert apart-

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tion by another state. *Commonwealth* v. *Firestone*, 253 Pa. Super. 577, 583, 385 A.2d 489, 492 (Pa. Super. Ct. 1978). *Cf. Sherrer* v. *Sherrer*, 334 U.S. 343, 354-55 (1948). The Georgia entry of Mr. Heath's guilty plea necessarily rested upon a finding that the murder occurred in Georgia.

ment. Owens called between 7:15 and 7:30 a.m. Mr. Heath drove to a gas station in Columbus, Georgia, followed by Lambert in her truck, and met Owens and his partner there, at about 5 or 10 minutes before 8:00 a.m. Mr. Heath got in Lambert's truck. They drove to Mr. Heath's home. Mr. Heath then drove to Lambert's apartment in Columbus, Georgia (J.A. at 44-45; T.R. At 545-46).

As this summary of the relevant portions of the record makes clear, both the murder and most of the underlying activity occurred in Georgia. That state took jurisdiction of the matter and placed Mr. Heath in jeopardy for his life. Indeed, the facts of this case strongly suggest that Alabama overreached its constitutional authority in exercising jurisdiction over these events that occurred in another state.[5] Assuming *arguendo* that Alabama did have concurrent jurisdiction with Georgia over the murder, once the state with the closest ties and most intimate nexus has taken jurisdiction and placed the defendant in jeopardy for his life, that should be the end of the matter. Indeed, once any state has taken jurisdiction over an event in which there is concurrent jurisdiction based upon extra-territorial jurisdiction, that should be the end of the matter. The double jeopardy clause should not be interpreted to allow multiple trials for the same offense merely because rules of jurisdiction allow more than one state to take jurisdiction over an event. To so construe the double jeopardy clause would be tantamount to its repeal. If every state with an interest in some criminal event has jurisdiction and can try a defendant for it, then a multiplicity of trials of the same offense may be brought.

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[5] *See Huntington* v. *Attrill*, 146 U.S. 657, 666, 669, 671-3 (1892); *State* v. *Huginski*, Vt. 95, 97-98, 422 A.2d 935, 937 (1980); R. Anderson, 4 *Wharton's Criminal Law & Procedure* § 1501 (1957). *Cf. Pennoyer* v. *Neff*, 95 U.S. 714, 720, 722-23, 728-30 (1878); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 315-17 (1945).

Take the Heath case as an example. Suppose the victim, an Alabama resident, had been visiting someone in Tennessee and was kidnapped there. Suppose further that she had been transported through two other states and finally killed in Georgia with a gun stolen from Maryland. If the double jeopardy clause does not preclude multiple trials for the same offense by states with an interest in and thus concurrent jurisdiction of the offense, then six states could try our hypothetical defendant for murder: Alabama because the victim was a citizen of that state; Tennessee because of the kidnapping; Georgia because the crime occurred there; Maryland because a gun feloniously obtained there was used in the murder; and two states because a kidnapped person who ultimately was killed was transported illegally through those states.

The possibilities are endless, mindboggling, and must not be allowed. Once the state where the crime occurred has taken jurisdiction and prosecuted the offense, the double jeopardy clause should prohibit further prosecutions for that offense. This Court in *Nielsen* v. *Oregon*, 212 U.S. 315 (1909) stated that once one state prosecuted for an offense that was committed on the common boundary of two states, the other may not do so. *Id* at 320. That is equivalent to stating that once one state takes jurisdiction over an act, other states with concurrent jurisdiction may not do so. The same result must obtain in this case, unless the double jeopardy clause is to be emasculated.

The dual sovereignty exception to the double jeopardy clause does not affect this conclusion. As is argued in detail in Part II of the Brief, that exception should not apply to successive state prosecutions. Moreover, that exception arose to accommodate conflicts that result from two governments having concurrent territorial jurisdiction, as the states and the federal government do. *See, e.g. Moore* v. *Illinois*, 55 U.S. (14 How.)13 (1852); *Bartkus* v. *Illinois*, 359 U.S. 121 (1959). The states do not as a rule possess concurrent territorial jurisdiction. Where the issue is *extra-territorial* jurisdiction, as it is in this case, the dual sovereignty exception is inapplicable, and

our abhorrence for subjecting a person to multiple trials for the same offense should result in applying the normal rule of the double jeopardy clause that only one prosecution for a single offense may be had.

C. The Policies Of The Double Jeopardy Clause Were Grossly Violated By Twice Placing Mr. Heath In Jeopardy Of His Life For The Same Offense.

By its very terms, the fifth amendment prohibits what happened to Mr. Heath—"nor shall any person be subject for the same offense to be twice put in jeopardy of life. . . ." U.S. Const. amend. V. Mr. Heath was charged by the state of Georgia with a capital offense and his life put in jeopardy for that offense by the filing of a Notice of Aggravating Circumstances. (J.A. at 4, 5; T.R. at 740, 742). The state of Georgia resolved the death penalty issue in Mr. Heath's favor by the imposition of his life sentence. *Cf. Arizona* v. *Rumsey*, 104 S. Ct. 2305 (1984); *Bullington* v. *Missouri*, 451 U.S. 430 (1980). Subseqeuntly, he was indicted for the same capital offense by Alabama and thus in the words of this Court in *Green* v. *United States*, 355 U.S. 184, 187-8 (1957), "repeated attempts to convict" Mr. Heath of capital murder occurred, "thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility" of an erroneous verdict. If repeated trials of an individual where the punishment is a prison term are not to be allowed, and if the endless anxiety and insecurity such a state of affairs would generate violates our fundamental values, *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977), *a fortiori* the same result should obtain where the issue is not a prison term but the extinguishing of a person's life.

The consequence of legitimizing what Alabama has done to Mr. Heath is bad enough standing alone, but this Court must also bear in mind that, by upholding Alabama's prosecution, it also creates the conditions under which not just two but an endless series of prosecutions could occur. Single states could

repeatedly try an individual for the same capital offense by varying the aggravating circumstance; every state with an "interest" in the transaction could try an individual for the same offense. Surely if the double jeopardy clause means anything, it prohibits a multiplicity of trials for the same capital offense with an individual kept in an endless state of jeopardy for his very life and with the resultant risk that eventually an erroneous judgment of death will be imposed. This Court should not permit repeated efforts to deprive a person of his life. Once a state with jurisdiction has put an individual in jeopardy of his life, the double jeopardy clause should not be interpreted to provide the opportunity for subsequent efforts to execute the individual.

So holding would not place this Court in opposition to the principles and traditions of this country; in fact, just the opposite is true. While a number of states do possess statutes allowing for some extra-territorial jurisdiction[6]—thus creating

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[6] *See, e.g.*, Colo. Rev. Stat. § 18-1-201 (1963); Fla. Stat. Ann. §§ 910.005 et seq. (West 1970); Kan. Stat. Ann. § 22-2612 (1970); N.C. Gen State. § 15A-134 (1973); W. Va. Code § 61-11-10 (1923). However, about forty states bar dual sovereign prosecutions in the area of drug offenses. L. Miller, *Double Jeopardy and the Federal System*, 102 (1968); *United States* v. *Jones*, 527 F.2d 817, 832 (D.C. Cir. 1975) (Wright, J., dissenting). Furthermore, twenty-seven states provide broad limitations upon dual sovereign prosecutions in general. Eleven states basically bar such prosecutions when they arise out of the same transaction. *See* Alaska Stat. § 12.20.010 (1962); Cal. Penal Code §§ 656, 793 (West 1970); Idaho Code § 19-315 (1972); Ind. Code § 35-41-4-5 (1977); Mont. Const. art. II, § 25, Mont. Code Ann. § 46-11-504 (1977); Nev. Rev. Stat. § 171.070 (1911); *State* v. *Hogg*, 118 N.H. 262, 385 A.2d 844 (N.H. 1978); N.D. Cent. Code § 29-03-13 (1943); Okla Stat. Ann. tit. 22, § 130 (West 1971); Va. Code § 19.2.-294 (1975) (prior federal prosecution); Wash. Rev. Code Ann. § 10.43.040 (1909).

Eight states bar a second prosecution arising out of the same transaction unless it is not for the same offense and it serves a distinct

ing the problem this Court faces in this case—counsel for Petitioner, after diligent search, has not been able to find a *single case* where multiple convictions for the same murder have been approved, and one certainly cannot find any other case where there is a second conviction for the same murder that results in a sentence of death. Indeed, virtually the only federal authority on the problem of concurrent state criminal jurisdiction is *Nielsen* v. *Oregon*, *supra*. The reason for this paucity of material is obvious. This nation abhors multiple trials and punishments, and thus that activity does not flourish.

In fact, it is difficult to find cases where the same noncapital offense is tried twice. There are a number of cases where states have upheld the constitutionality of separate trials for different parts of a criminal transaction where some parts occurred

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societal interest not served by the relevant criminal statutes of the first sovereign. *See* Ark. Stat. Ann. § 41-108 (1975); Ark. Stat. Ann. § 43-1224.1 (1965); Colo. Rev. Stat. § 18-1-303 (1973); Del. Code Ann. tit. 11, § 209 (1953); Hawaii Rev. Stat. § 701-112 (1972); Ky. Rev. Stat. § 505-050 (1974); *People* v. *Cooper*, 398 Mich. 450, 247 N.W.2d 866 (Mich. 1976); N.J. Stat. Ann. § 2C:1-11 (1978) (prior federal prosecution); 18 Pa. Cons. Stat. Ann. § 111 (Purdon 1972); *Commonwealth* v. *Mills*, 447 Pa. 163, 286 A.2d 638 (Pa. 1971).

See also Model Penal Code § 1.10 (Proposed Official Draft 1962).

Finally, eight states bar dual sovereign prosecutions of the same offense. *See* Ill. Rev. Stat. ch. 38, § 3-4(c) (1961); Kan. Stat. Ann. § 21-3108 (1977); Minn. Stat. Ann. § 609-045 (1983); Miss. Code Ann. § 99-11-27 (1942); N.Y. Crim. Proc. Law § 420.20 (1970); N.C. Gen. Stat. § 15A-134 (1973); *State* v. *Batdorf*, 293 N.C. 486, 238 S.E. 2d 497 (1977); Utah Code Ann. § 76-1-404 (1953); Wis. Stat. Ann. § 939.71 (1955).

Other states are likely to limit such prosecutions as a matter of policy, given the general distaste with which these proceedings are viewed. *Cf.* L. Miller, *Double Jeopardy and the Federal System* 56n.26 (1968).

in one state and other parts in another state,[1] but that does not advance analysis of multiple trials for the same offense. Moreover, in those few cases where multiple trials for the same offense do occur, there is not infrequently the suggestion that the first trial was a sham. Sham trials do not place a person in jeopardy. 21 Am. Jur. 2d *Criminal Law* § 257 (1981). Thus, such cases are unenlightening as to double jeopardy principles.

Consider, for example, *State* v. *Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981). The defendant, a citizen of Massachusetts, defrauded a citizen of Tennessee of $500,000 based on acts which all took place in Tennessee. He was indicted in Tennessee on January 30, 1980; he was indicted in Massachusetts on March 3, 1980. The defendant pleaded guilty in Massachusetts on July 29, 1980 and received a jail term of 20 months. The defendant subsequently pleaded guilty to the same offense in Tennessee reserving his right to appeal. In affirming over a double jeopardy claim, the court commented that "it is interesting to note that Massachusetts thought the theft of $500,000.00 was worth only 20 months confinement. The expeditious plea and sentence in that state should not in consideration of societal fairness enable the appellant essentially to escape punishment." Id. at 287. The obvious implication is that there was doubt about the seriousness of the Massachusetts litigation. Although the Tennessee court did not go so far as to accuse the Massachusetts authorities of perpetrating a sham prosecution, the unspoken message is clear.

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[1] These cases typically involve a far greater nexus to the underlying transaction in the second state. *See, e.g., People* v. *Walker*, 123 Cal. App. 3d 981, Cal. Rptr. 177 (1981). In *Walker*, a Nevada conviction for receiving stolen property based on possession of stolen travelers' checks was followed by California charges and guilty pleas to robbery and using a gun in the commission of an offense, arising out of the California robbery in which the checks were stole. *See also State* v. *Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981), discussed *infra* in the text of the Argument.

The proceedings in Georgia in Mr. Heath's case, by contrast, clearly were not sham proceedings. He was in jeopardy there for his life, and never throughout the course of these proceedings has there been a suggestion that the Georgia authorities were not operating in the utmost good faith. Indeed, to the extent there is any indication of bad faith in these proceedings, it is attributable to the state of Alabama. Alabama officials were apparently fully appraised of all the events in the Georgia proceedings, and cooperated in the investigation. (T.R. at 361-63; 366-67, 372, 381, 383-90, 398-99.) They certainly must have been aware that Mr. Heath pleaded guilty and was sentenced to life on February 10, 1982. Approximately three months later, on April 28, 1982, Mr. Heath was called to testify against the alleged actual killers in their trial in Georgia. Mr. Heath refused to testify on basis of this fifth amendment privilege. (J.A. at 47-48; T.R. at 550-51). Up until then, Alabama had shown no interest in prosecuting Mr. Heath. Seven days later, on May 5, 1982, a grand jury was empaneled in Russell County, Alabama, and returned an indictment for capital murder against Mr. Heath. This smacks of actual vindictiveness on the part of the Alabama authorities as well as strongly suggesting that the state of Alabama has sanctioned Mr. Heath's legitimate exercise of his fifth amendment right not to incriminate himself with the death penalty.

Not only is there no suggestion that Georgia officials acted in bad faith, but also there are grounds that suggest that Alabama officials did. Accordingly, this second prosecution cannot be justified on the grounds that the first prosecution was a sham. Thus, if the Court permits the Alabama conviction to stand, not only will it sanction one of the few cases in our national history where the exact same offense forms the basis for multiple trials and convictions by two states, and perhaps the only such case where there is not some mitigating factor such as a sham prosecution in the background, in addition it will allow what diligent research has shown to be the only case in

our history where two convictions for the same murder have been obtained by any two jurisdictions.[9]

Mr. Heath's double jeopardy rights clearly were violated by his prosecution in Alabama for the same murder for which he was previously prosecuted in Georgia. Therefore, this Court should reverse the Alabama conviction and remand Mr. Heath to the custody of the Georgia authorities to serve his life sentence.

II

THE DUAL SOVEREIGNTY EXCEPTION TO DOUBLE JEOPARDY IS NOT APPLICABLE TO SUCCESSIVE PROSECUTIONS BY TWO DIFFERENT STATES.

A. The "Dual Sovereignty" Exception Was Created To Minimize The Potential Conflicts That Result From Overlapping Territorial Jurisdiction And The Resultant Overlapping Of Statutory Schemes Of Quite Different Governmental Entities Pursuing Fundamentally Different Interests, And Its Scope Should Be Determined By The Policies That Led To Its Creation.

The dual sovereignty doctrine is an exception to the normal rules of double jeopardy. Indeed, it is an exception with a

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[9] *Cf. People* v. *Gay*, 407 Mich. 681, 289 N.W.2d 651 (1980). In *Gay*, defendants Gay and Geriofs were charged with three federal crimes, including murder of a bank teller during a robbery. Gay was convicted on all three counts, Geriofs was convicted on two counts but acquitted of the murder. Gay's convictions were reversed, but all three charges were brought again, and he pleaded guilty to all three. Each defendant was then charged with the same murder in Michigan's courts. Both defendants were convicted. The Michigan Court of Appeals reversed on state double jeopardy grounds. The Michigan Supreme Court affirmed. The court held that the state's interest in trying the defendants for murder did not differ substantially from that addressed in the federal prosecution, *id.* at 692-3 695-704, 289 N.W.2d at 654, 655-59, and that the state prosecutions therefore violated the state constitution's double jeopardy prohibition. *See also* Commonwealth v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971).

somewhat tainted lineage. When the fifth amendment was under consideration in Congress, language was proposed that would have limited its scope to those twice in jeopardy "by any law of the United States."[9] The language was rejected in favor of the language presently found in the fifth amendment, indicating that the drafters did not intend to permit multiple prosecutions for a "single offense." Indeed, this Court in one of its earliest discussions of the double jeopardy clause and federal-state relations intimated that multiple prosecutions were impermissible. *Houston* v. *Moore*, 18 U.S. (5 Wheat) 1, 22-24 (1820).

This early understanding of double jeopardy was soon supplemented by the dual sovereignty exception. In order to understand the scope of that doctrine, the conditions that gave rise to it must be examined. The possibility of successive state and federal prosecutions was not viewed early in our history as a serious problem because it was not anticipated that it would arise with any frequency.[10] The federal government was viewed as operating within its sphere, the various states within theirs, and the interests of the two general spheres of influence were sufficiently distinct that it was not intuitively obvious that federal and state criminal statutes would overlap substantially. *See Fox* v. *Ohio*, 46 U.S. (5 How.) 410, 432-35 (1847); *United States* v. *Marigold*, 50 U.S. (9 How.) 560, 567-70 (1850).

It was not long, though, before it must have become obvious that the respective scope of federal and state criminal jurisdiction could entail considerable overlap,[11] and thus this Court soon had to face the question of how to work out possible conflicts between the exercise of federal and state jurisdiction over the same act or transaction. Moreover, the earlier view

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[9] 1 *Annals of Cong.* 753 (J. Gales ed. 1789).

[10] L. Miller, *Double Jeopardy and the Federal System* 34-36 (1968).

[11] L. Miller, *Double Jeopardy and the Federal System* 36-7 (1968).

suggested in *Houston* v. *Moore*, that prosecution by either a state or the federal government would bar a prosecution by the other now presented greater problems. Even though there was substantial overlap in the coverage of statutes, those statutes often protected fundamentally different interests. *United States* v. *Cruikshank* 92 U.S. 542, 550, (1876). Allowing the prosecution by one government entity to preclude the other could result in the interests of either the state or the federal government not being completely protected, a result obviously to be avoided if possible. *See Marigold* 50 U.S. (9 How.) at 569-70.

Another possible method of reconciling the demands of federalism to the dictates of the double jeopardy clause was briefly considered and implicitly rejected. That was to allow for implicit federal pre-emption wherever there were overlapping statutes penalizing the same act. *See Moore* v. *Illinois*, 55 U.S. (14 How.) 13, 21-22 (1852). A consideration of *Moore* where the dual sovereignty exception was finally fully articulated indicates why that path was not followed.

In *Moore* v. *Illinois*, this Court upheld a constitutional challenge to the Illinois Fugitive Slave law. It was challenged on the grounds that the existence of federal legislation covering the same act gave rise to the risk of double trial and punishment violative of the double jeopardy clause. The Court rejected the challenge on the dual sovereignty grounds earlier articulated in *Fox*, and *Marigold* The decision was an inevitable consequence of its historical context. In *Moore*, this Court was being asked to strike down a type of state statute that was at the heart of a storm over the scope of states' rights, a storm so serious that it would eventuate in the Civil War. Moreover, it was being asked to do so where the laws of neither "sovereign" impinged upon the other's, *id.* at 18-22, and in a context where this Court surely was beginning to realize that state and federal criminal statutes were going to overlap and intersect in unpredictable ways. Thus, the Court created the means of accommodating the competing interests of the state

and national governments, see, Harrison, *Federalism and Double Jeopardy: A Study in the Frustration of Human Rights*, 17 U. Miami L. Rev. 306, 313 (1963); a reconciliation perhaps made all the happier because it was dicta in each of the three cases.[12]

In sum, then the Court was faced with the problem of reconciling competing claims of jurisdiction asserted by the state and federal govenments through overlapping criminal statutes generally designed to further the very different interests of the respective governments. Thus "dual sovereignty" was born, at a time of growing national controversy over states' rights, as a means to reconcile the possible tensions that can result as the states and the federal government go about their respective concerns. Indeed, the label "dual sovereignty" is a misnomer to a degree. Although each of the early cases giving rise to the doctrine discuss ideas of sovereignty, they also discuss in detail the separate interests served by the criminal jurisdiction of the federal and state governments. *Fox*, 46 U.S. (5 How.) at 433-34; *Marigold*, 50 U.S. (9 How.) at 568; *Moore*, 55 U.S. (14 How.) at 19.

To be sure, the Court could have required the states to demonstrate in each prosecution where there was a risk of

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[12] No "dual sovereignty" case involved two actual prosecutions until *United States* v. *Lanza*, 260 U.S. 377 (1922). *Lanza* involved the unique circumstance of the explicit "concurrent" power of the federal government and the states under the eighteenth amendment. U.S. Const. amend. XVIII (repealed). It was not until 1959 that the Court upheld two actual prosecutions outside that context. *Bartkus* v. *Illinois*, 359 U.S. 121 (1959); *Abbate* v. *United States*, 359 U.S. 187 (1959). Both these cases preceded the incorporation of the double jeopardy prohibition into the fourteenth amendment. *Benton* v. *Maryland*, 395 U.S. 784 (1969). Doubt about the continuing vitality of the dual sovereignty theory has also been created by *Elkins* v. *United States*, 364 U.S. 206 (1960) and *Murphy* v. *Waterfront Commission*, 378 U.S. 52 (1964), where different "sovereigns" were forbidden to act such that in combination they violated defendant's rights.

multiple trials or punishments that the interests served by the state prosecution were sufficiently different from those that would be served by the federal prosecution (or vice versa), a position adopted by the United States later both in the brief and oral argument in *Abbate*[13] and essentially in the *Petite* policy.[14] It is clear why the Court did not do so, however. To require such a review would have been an affront to the very dignity of the states that was at the heart of political discussions in pre-Civil War times.

"Dual sovereignty," in short, arose as what was perceived to be a necessary exception to the normal rules of double jeopardy, and the dual sovereignty exception should only apply where the reasons for its creation are present: 1. Substantially overlapping jurisdictions, 2. by governmental entitles pursuing quite diverse interests, 3. where there is a risk of interference by one governmental entity in the affairs of another, 4. and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit. As it discussed below in § D, none of these conditions are present in successive state prosecutions, and thus the conclusion is inescapable that no notion of dual sovereignty can apply to permit successive state prosecutions. Before that argument is made, however, the argument that dual sovereignty is a creation designed to ameliorate the tensions resulting from the interaction of fundamentally different governmental units will be supported first by demonstrating that the contemporary cases strongly support that proposition, and second by demonstrating that nothing useful emerges from focusing on "sovereignty" alone without reference to the interests "sovereignty" is designed to embody.

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[13] *Abbate* v. *United States*, 359 U.S. 187, 196 (1959) (Brennan, J., separate opinion).

[14] After *Petite* v. *United States*, 361 U.S. 529 (1960). The current statement of the policy may be found in *United States Attorney's Manual*, § 9-2.142 (January 3, 1980 revision).

B. The Contemporary Cases Support The Proposition That "Dual Sovereignty" Is To Be Applied Only Where There Is A Conflict Between Fundamentally Different Governmental Entities Pursuing Diverse Interests And Where There Is A Substantial Risk Of Inter-Governmental Conflict.

A comparison of the modern Court's two leading cases interpreting the dual sovereignty doctrine—*Waller* v. *Florida*, 397 U.S. 387 (1970), and *United States* v. *Wheeler*, 435 U.S. 313 (1978)—supports the proposition that the dual sovereignty exception should only be applied where there is substantially overlapping jurisdiction that would lead to the interference by one governmental entity in the affairs of another and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit.[15]

In *Waller*, the defendant was convicted in a city court for destruction of city property and disorderly breach of the peace. *Waller*, 397 U.S. at 388. Subsequently, he was convicted of grand larceny in a court of general jurisdiction based upon the identical acts that resulted in the city court convictions. This

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[15] An examination of *Bartkus* and *Abbate* also supports this conclusion. In each case the state and federal government shared territorial jurisdiction, of course. In *Bartkus*, the federal statute protected the federally insured banking system. *Bartkus*, 359 U.S. at 121-2. Illinois prosecuted and convicted under a simple robbery statute. *Id.* Furthermore, Illinois had a special interest in the offender, in that he fell under the habitual criminal statute, and was therefore sentenced to life imprisonment. *Id.* at 122. The second prosecution was therefore necessary to serve an important and unique state interest.

In *Abbate*, the state conviction was for conspiracy to injure or destroy private property. *Abbate*, 359 U.S. at 188. The defendants pleaded guilty and received three month sentences. *Id.* The federal conspiracy statute protected "means of communication operated and controlled by the United States," *id.* at 188-9, here including equipment used by the Strategic Air Command, among other federal instrumentalities. *Id.* The federal prosecution was obviously necessary to protect vital distinct federal interests.

Court reversed. In reversing, this Court did note that cities are not considered separate sovereign entities from the state within which they are located, and referred to the relevent Florida law. *Waller* 397 U.S. at 392-93.[16] In its most telling passage, however the Court stated:

> In this context, a "dual sovereignty" theory is an anachronism, and the second trial constituted double jeopardy in violation of the Fifth and Fourteenth Amendments to the Constitution.
>
> We decide only that the Florida courts were in error to the extent of holding that—"even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court." *Waller*, 397 U.S. at 395.

This passage is revealing because it suggests that the basis of the decision is that the interests at stake in the two prosecutions were identical. Because the defendant was previously placed in jeopardy *in light of those interests* by the first conviction, the second prosecution, also premised on those same interests, violated double jeopardy. Finally, there was in *Waller* no concern of intergovernmental interference. The state of Florida could easily decide how it wished such cases as *Waller*

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[16] Cities are not necessarily creatures of the state government. *See, e.g., City of New Orleans* v. *Harrison*, 257 La. 923, 244 So.2d 834 (1971) (state may not infringe upon city's constitutionally created system of traffic courts). Under the Montana constitution, the state and cities partake of "shared sovereignty." *State ex. rel. Swart* v. *Molitor*, 38 Mont. 71, 72-3, 621 P.2d 1100, 1102 (1981). Some cities were created by royal charter and have continuously exercised "sovereignty." M. Gelfand, *A Nation of Cities* 4-5 (1975). It is not clear that they can be distinguished from Indian tribes based upon a purely historical sovereignty analysis. *Cf. United States* v. *Wheeler*, 435 U.S. 313 (1978).

These facts demonstrate that a double jeopardy analysis that focuses directly upon "sovereignty" is likely to be unsatisfactory.

to be prosecuted and in which court they are to be tried. Florida simply cannot authorize trying them more than once.

This Court relied on the dual sovereignty theory eight years after *Waller* in *United States* v. *Wheeler*, 435 U.S. 313 (1978). An examination of the opinion in *Wheeler* discloses that the basis of decision was the Court's analysis of the interests underlying the successive prosecutions.

In *Wheeler*, the Court reviewed the constitutionality of a statory rape conviction under federal law premised on the same conduct that a year earlier to the rape conviction had given rise to a conviction for disorderly conduct and contributing to the delinquency of a minor in a tribal court. In its opinion, the Court assumed that the "contributing to the delinquency" offense was a lesser included offense of statutory rape. *Wheeler*, 435 U.S. at 317n. 4. Nevertheless, the Court affirmed on two grounds. The first was the idea of dual sovereignty. *Id.* at 317-30. As will be discussed in the next section of the Brief, reliance on ideas of sovereignty to determine the scope of the double jeopardy clause is a highly problematic enterprise. Second, the Court focused on the interests at stake in the two prosecutions and concluded that what was involved here was the overlap of two statutory schemes emanating from two fundamentally different governmental entities. Thus, because of the differing interests at stake and protected by the two governments, the two prosecutions did not violate double jeopardy.

This Court first noted that, given the different interests of the federal and tribal governments, the failure to allow multiple prosecutions could easily result in each governmental entity frustrating the concerns of the other. *Id.* at 317-18. The Court proceeded to state:

> This problem would, of course, be solved if Congress, in the exercise of its plenary power over the tribes, chose to deprive them of criminal jurisdiction altogether. But such a fundamental abridgement of the powers of Indian tribes might be thought as undesirable as the federal preemption of state criminal jurisdiction that would have

> avoided conflict in *Bartkus* and *Abbate*. The Indian tribes are " distinct political communities" with their own mores and laws, *Worcester* v. *Georgia*, 6 Pet., at 557; *The Kansas Indians*, 5 Wall. 737, 756, which can be enforced by formal criminal proceedings in tribal courts as well as by less formal means. They have a significant interest in maintaining orderly relations among their members and in preserving tribal customs and traditions, apart from the federal interest in law and order on the reservation. Tribal laws and procedures are often influenced by tribal custom and can differ greatly from our own. See *Ex parte Crow Dog*, 109 U.S., at 571.
>
> Thus, tribal courts are important mechanisms for protecting significant tribal interests. Federal pre-emption of a tribe's jurisdiction to punish its members for infractions of tribal law would detract substantially from tribal self-government, just as federal pre-emption of state criminal jurisdiction would trench upon important state interests. Thus, just as in *Bartkus* and *Abbate*, there are persuasive reasons to reject the respondent's argument that we should arbitrarily ignore the settled "dual sovereignty" concept as it applies to successive tribal and federal prosecutions. *Wheeler*, 435 U.S. 313 at 331-32 (footnotes omitted).

Thus, *Wheeler* is not premised just upon the fact that in some unspecified way Indian tribes possess or exercise aspects of sovereignty. Instead, *Wheeler* is obviously a lineal descendant of cases such as *F[illegible]* and *Marigold* where the Court attempted to construct a method to alleviate the conflicts that can arise when fundamentally different governmental institutions pursuing quite different interests, happen to legislate in such a way as to make certain acts criminal under the laws of both governmental units. As in the earlier cases, the Court could have found double jeopardy to apply, but that risks too much inter-governmental conflict. The Court alternatively could have found there to be federal pre-emption, but that would have worked too drastic a change on an ongoing social dynamic and political entity. In light of these concerns, then, once again this Court concluded that the institutional interests outweighed those of the individual and thus that dual prosecutions

had to be permitted. That decision may have been articulated in the language of sovereignty, but it seems clear that the true basis of decision was an analysis of the interests at stake.

The contemporary decisions of the Court support the proposition that "dual sovereignty" is a label that is applied to the conclusion that sufficient governmental interests are at stake to justify multiple prosecutions notwithstanding the adverse impact that conclusion has on the interests of the defendant. When that is not the case, however, the interests of the individual should take precedence and one's rights under the double jeopardy clause should be respected. As will be agrued in § D, below, that is the situation in Mr. Heath's case. Before making that argument, however, the idea of "sovereignty" as an independent limit on the double jeopardy clause will be discussed.

C. "Dual Sovereignty" As An Expression Of Ideas Of Sovereignty Is An Inadequate Basis For Determining The Scope Of The Double Jeopardy Clause.

This Court consistently has invoked the idea of sovereignty to justify decisions allowing successive prosecutions based on the same act. As was argued in § B, supra, the cases are best understood as primarily relying on the label "dual sovereignty" to express a conclusion reached by analyzing the interests at stake in cases of multiple prosecutions. This conclusion is furthered by the fact that it is quite unclear what the concept connotes or what are its implications.

"Sovereignty" is apparently used to refer to "the ultimate source of the power under which the respective prosecutions were undertaken," *Wheeler*, 435 U.S. at 320. In the context of successive federal and state prosecutions, the Court has asserted that "State and Federal Governments 'deriv[e] power from different sources,' each from the organic law that established it." *Id*, at 320, quoting from *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). This suggests that one must look to the "ultimate source of power" in determining the meaning of

sovereignty and that when one looks there "organic law" will be found that establishes independent power in the state and federal governments.

However effective and accurate these assertions are as political symbolism they are considerably less useful if taken as descriptions of political reality. First, to the extent there is an "ultimate source of power" upon which rests state and federal prosecutions it is the same in both instances. It is the consent of the governed, of We the People. The U.S. Constitution, as well as state constitutions, are derivative of that power and are not themselves "ultimate sources of power." *See Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1792). Moreover, state and federal constitutions are themselves in a highly symbiotic relationship. For example, the federal government is charged to maintain a Republican form of government in the states, U.S. Const. art. IV, § 4, and state governments, duly formed under state constitutions, are accorded a significant role in the amendment of the federal constitution. U.S. Const. art. V. Thus, to the extent that there exists an "ultimate source of power," it is quite clear that it resides in the body politic and nowhere else, and that state and federal constitutions, which legitimize state and federal statutory law, are derivative of that power.

Perhaps, though, "ultimate power" in this context can be conceived in somewhat less grandiose terms. For example, sovereignty might mean the "ultimate" (used somewhat loosely) authority to control a prosecution. This is probably what was being referred to in *Waller*, where the state legislature could decide which court could try which offense and where the legislature had virtually absolute control over the power exercised by the city. That idea cannot explain cases such as *Wheeler* and *Bartkus*, however. When a legitimate federal statute overlaps that of a state or Indian statute, there exists a power of federal pre-emption under the supremacy clause. *See e.g. Bartkus*, 359 U.S. at 157 (Black, J. dissenting). Thus, it is accurate in every relevant sense that state or Indian prosecutions in such cases occur at the pleasure of Congress.

Similarly, in *Wheeler*, after describing the Indian tribe as a "separate sovereign," the Court pointed out that not only could Congress eliminate any right of the tribe to punish its members, but also that there was a federal statute that limited punishment imposed by tribal courts to a maximum of six months in prison or a five hundred dollar fine. *Wheeler*, 435 U.S. at 327-28. It is respectfully suggested that it is rather difficult to reconcile the idea of Indian tribes as "sovereign" in any serious sense relevent to Mr. Heath's prosecution with the federal limitation on their power to try cases to petty offenses. If sovereignty in fact has its referent in "ultimate sources of power," it is clear that neither states nor tribes possess such power in the context of any case that the Court has decided on the basis of "dual sovereignty." Thus, it is not "sovereignty" as such that has motivated this Court's decisions; it is rather sovereignty as a summary of the underlying interests that has done so.[17]

This conclusion is confirmed by considering other ways to define sovereignty. One meaning of the term may refer to the historical source of power, or more accurately put, of self-governance. Thus, the thirteen original states were once independent and exercised all the powers their respective populations accorded them, one of which was the power to criminalize conduct. The difficulty with this understanding is that most of the present states did *not* come to the Union out of such an independent status, and thus as applied to them the description is simply wrong.

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[17] In *Wheeler*, the Court indicated its uncertainty as to the outcome if a tribe lost and then regained its "sovereignty" through federal statutes that first removed and then restored the tribe's power to enforce its own criminal statutes. *Wheeler*, 435 U.S. at 328n. 28. Peitioner respectfully suggests that the applicability of the double jeopardy prohibition and the dual sovereignty exception should not turn upon such trivial facts, but rather on the weighing of fundamental interests.

Most states were created out of territories held by the federal government. These states did not "historically" possess the powers of original states; Congress has plenary power over territories based on U.S. Const. Art. IV, § 3. Indeed, the Court, in a unanimous opinion has said in dicta that "the relationship of a territory to the Federal Government has been accurately compared to the relationship between a city and a state." *Wheeler*, 435 U.S. at 321 n. 16. It is obviously inadequate, then, to argue from the "sovereign power" of states in a historical sense, when most states were created by the power of the central government. Moreover, it is obviously begging the question to assert that, once a territory becomes a state, it then possesses these "sovereign" powers that are under examination. A territory admitted to statehood certainly possesses powers, but they are those accorded the state by the constitutional process of admission. U.S. Const. art. IV, § 3. It does not possess whatever power it has for reasons anterior to or distinct from that scheme.[18]

This argument, it should be noted, is not an assault on state governments as important elements in our constitutional scheme, nor is it an assault on the "dual sovereignty" exception as it has been developed by this Court. Rather, it is an attempt to show that it is a question begging exercise to argue that dual prosecutions are permitted by state and federal governments for the same offense *because* they are "separate" sovereigns. Rather they are sovereign to that extent *because* this Court

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[18] The dual sovereignty theory does not apply to the federal government and a territory. *Puerto Rico* v. *Shell Co.*, 302 U.S. 253 (1937). And yet, it is the "universal practice" to permit newly created states to prosecute crimes committed in the territory before the state existed. *Higgins* v. *Brown*, 1 Okla. Crim. 33, 69, 94 P. 703, 717 (Okla. 1908); *Ex Parte Barber*, 87 Okla. Crim. 201, 204-10, 196 P.2d 695, 697-700 (Okla. Crim. App.), *cert. denied*, 335 U.S. 847 (1948). This is yet another situation where the outcome cannot be reconciled with an analysis of "sovereignty" as such. Rather, this result is a function of the underlying interests involved.

has so construed the double jeopardy clause. That construction, though, can rationally rest only on this Court's analysis of the underlying interests at stake.

As has previously been pointed out, both the history of the creation of the double jeopardy clause and this Court's earliest discussion of it suggest that the views of the Framers were that dual prosecutions by state and federal governments were not to be allowed. This Court has obviously found that position untenable and has created a dual sovereignty exception. But in doing so, it has pointed to no historical materials mandating that result. In fact, after a review of the relevant materials, Justice Frankfurter, speaking for the Court in *Bartkus* v. *Illinois*, 359 U.S. 121, 131 (1959), asserted that the relevant historical materials are inconclusive. That is certainly true to some extent. If it is true, however, it will not do to invest the word "sovereignty" with meaning based upon that ambiguous history. The alternative, of course, is to invest it with meaning based on the underlying interests. Petitioner respectfully submits that that is what the Court has done in this context, as it has done in related ones. In its examination of the right to retry an individual after an appellate reversal of his conviction, this Court asserted that "of greater importance than the conceptual abstractions employed to explain the *Ball* principle are the implementations of that principle for the sound administration of justice." *United States* v. *Tateo*, 377 U.S. 463, 466 (1964). What was true in *Tateo* is true in the present case as well. It is not abstractions about "sovereignty" that matter; it is instead the underlying interests. When those interests are examined in the context of successive state prosecutions, as is done in the next section of this Brief, it will be observed that they do not support the application of the dual sovereignty exception to successive state prosecutions for the same offense.

D. The Policies Of The Dual Sovereignty Exception Are Not Implicated By Successive State Prosecutions For The Same Offense And Consequently The Double Jeopardy Clause Should Forbid Successive State Prosecutions For The Same Offense.

The policies that form the basis of the dual sovereignty exception to double jeopardy militate against applying it to allow successive state prosecutions for the same offense. In other areas where dual sovereignty has been applied, both relevant governments had jurisdiction over the same landmass. There is concurrent territorial jurisdiction in a state government and the federal government and, at the pleasure of Congress, the same state of affairs pertains in Indian Reservations. This created the need to construct rules that would facilitate the resolution of potential inter-governmental conflict. "Dual sovereignty" responded to that need. States, by contrast, do not possess substantially overlapping jurisdiction. In fact, the single most important determinant of the scope of state jurisdiction is the territoriality principle.[19] Thus, only rarely will problems of concurrent jurisdiction arise, and the need for a general rule, especially one that adversely affects the important double jeopardy rights of individuals, is reduced commensurately.

When a case of concurrent jurisdiction does arise, only rarely will the statutory schemes of the two states be in conflict. The interests served by the criminal laws of the various states are not widely disparate. There are differences among the states, of course, but it is also true that state criminal law is primarily designed to protect the safety of citizens, their property and the public morals.[20] The typical state to state relationship in the context of the criminal law, in short, is one of similar entities pursuing similar purposes. It is not a rela-

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[19] *See supra* note 5.

[20] *See* W. LaFave & A. Scott, *Handbook on Criminal Law* 117 (1972).

tionship of quite different entities pursuing highly divergent interests. Thus, where two states have concurrent jurisdiction over a criminal event, the social interests at stake will virtually always be satisfied by a single prosecution of a particular crime.

Because the interests of the states in the context of the criminal law are not diverse, the prosecution of an offense in one state will not lead to interference by one governmental entity with the pursuit of the legitimate interests of another. Quite the contrary is true. The first prosecution will satisfy the interests in law and order possessed by all states. In fact, allowing multiple prosecutions may redound to the detriment of the states' interest in law and order. Exposing a criminal defendant to multiple trials in multiple states for the same offense will reduce the incentive on the part of criminal defendants to plea bargain with any particular state. There is only one reason why a second state would wish to prosecute for the same offense after trial in the first state, and that is to increase the punishment given after the first trial.[21] The reason a defendant pleads is to eliminate the risk of greater punishment. If that risk cannot be eliminated by a plea, as will be true if this Court applies the dual sovereignty exception to successive state

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[21] In *Ciucci* v. *Illinois*, 356 U.S. 571 (1958), the Court in a *per curiam* opinion upheld by a 5-4 vote an Illinois conviction and death sentence. The defendant had allegedly killed his wife and three children. He was prosecuted for one death, at a trial where evidence of all four killings was introduced, was convicted, and received a 20 year sentence. At a second such trial, he received a 45 year sentence. Finally, at a third trial, he received the death penalty. Justices Harlan and Frankfurter, two of the majority, suggested that, if the state's motive was to prosecute until it got a death sentence, that might constitute a violation of due process. *Id.* at 573. Justice Douglas dissented, speaking for Chief Justice Warren and Justice Brennan, on the basis that the repeated prosecutions had violated due process. *Id.* at 575. Alabama had no reason to prosecute Mr. Larry Heath except to seek to raise his punishment from life in prison to death.

prosecutions, defendants will be discouraged from entering into plea bargaining. In that event, a theory designed to reduce intergovernmental friction will act to increase it by allowing the risk of prosecution in one state for the same offense to make it more difficult for another state to engage in plea discussions with criminal defendants.[22]

Mr. Heath's case is a perfect example of all of these points. He was convicted of murder in Georgia for the killing of his wife. Whatever social interests there are in punishing and deterring murders, certainly they were satisfied by that conviction. Alabama has never suggested that it has some interest in this event that has not been satisfied by the Georgia conviction. Moreover, Alabama has never asserted that its interests are different from or antagonistic to Georgia's in this context. It merely asserts the right to retry Mr. Heath for no other reason than that it wishes to do so. The double jeopardy clause hopefully is not such an emasculated protector of fundamental human rights as to be avoided so easily. It stands for the proposition that a mark of civilization is that a society tries its grievances against citizens once and then the matter is left in repose. It may be that this principle needs qualification in light of our federal system when fundamentally different governmental entities pursuing quite diverse interests come into contact. When that is not the case, and it is *not* the case in the context of successive state prosecutions for the same offense, then the qualification should end and the normal rule forbidding multiple trials and punishments should be applied.

It also bears reiterating that should this Court extend the dual sovereignty exception to successive state prosecutions, the Court will not simply be permitting two prosecutions for the same offense as is normally true in cases where dual sovereignty applies. It will instead be authorizing a multiplic-

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[22] This is not nearly as serious a problem in the federal-state context, because of the *Petite* policy, (see *supra* note 14 and accompanying text), and because only two governments are usually involved.

ity of trials and punishments for the same offense, for whatever state has jurisdiction over an aspect of the relevant events apparently would be authorized to try the individual. The incongruity of that result with the aspirations underlying the double jeopardy clause is obvious.

E. Forbidding Successive State Prosecutions For The Same Offense Will Not Thwart Legitimate State Law Enforcement.

Because the policies that gave rise to the dual sovereignty exception would not be furthered by applying the exception to successive state prosecutions for the same offense, it ought not to be so applied. It is important to recognize that not applying the dual sovereignty exception to successive state prosecutions will not retard legitimate law enforcement objectives. As argued in § D, supra, where a state has already prosecuted for the offense in question, legitimate state interests have already been satisfied. By contrast, where a second state prosecutes for a different offense that is within its jurisdiction, double jeopardy would not be violated.

In Mr. Heath's case, for example, double jeopardy surely would not have been violated if Alabama had indicted and tried him for kidnapping. That is not what occurred, however. He was tried for murder, with kidnapping as an aggravating circumstance. The legitimate state interest in prosecuting Mr. Heath for the murder had already been satisfied, and the second prosecution for that offense violated double jeopardy. Kidnapping is a different offense, however, and a prosecution in Alabama for that offense would have been permissible.[23] Thus, Alabama cannot be heard to complain that a holding by this Court in favor of Mr. Heath will substantially affect its law

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[23] This would not be true if the Court adopted the "same transaction" test. *See Borchardt* v. *United States*, 105 S. Ct. 341 (1984) (Brennan, J., dissenting to denial of writ of certiorari). *Cf. Ashe* v. *Swenson*, 397 U.S. 436 (1970); *Brown* v. *Ohio*, 432 U.S. 161 (1977).

enforcement efforts. Rather, Alabama has overreached its legitimate authority in this case, and it ought not to be allowed to do so.[24]

Nor would such a rule create a race to the courthouse or encourage sham prosecutions designed to protect a person from prosecution in other states. As to the first issue, successive state prosecutions for the same offense are exceedingly rare, at least so far as Petitioner's diligent research has determined. The reason is surely that states normally cooperate in cases of concurrent jurisdiction. There is no reason to expect that to change. In fact, a holding by this Court in favor of Mr. Heath would merely encourage what must be the present practice. As to the second issue, as previously noted, sham prosecutions designed to shield individuals from being exposed to jeopardy have long been viewed as not invoking double jeopardy protections, and that doctrine is more than adequate to accommodate the problem.

In essence, then, all Mr. Heath is asking for is the application of the normal rule that when a court with jurisdiction over an event takes jurisdiction, that should be the end of the matter.[25] An individual ought not to be subjected to multiple trials and punishments merely because more than one political entity has one form of jurisdiction or another over the event in question. So holding is consistent with the policies of the double jeopardy clause, provides the individual with protection from the horri-

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[24] If the first state's prosecution was a sham, or if the second state truly seeks to protect a distinct and important societal interest not protected by the first state's criminal statute, then a second prosecution might be justifiable. However, despite every opportunity, Alabama has never suggested that either condition obtains. Clearly, this is not such a case.

[25] Traditionally, jurisdiction over a crime resides solely in the courts of the state where it was committed, and the laws of that state exclusively govern the nature of the offense. *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892); J. Story, *Conflicts of Law* 516 (1834).

ble harrassment of multiple trials and punishments and furthers rather than retards the federal scheme of government.

For all of the reasons given above, this Court should find that Mr. Heath's rights under the double jeopardy clause and the fourteenth amendment due process clause have been violated by the Alabama prosecution for the murder previously prosecuted by Georgia. Accordingly this Court should reverse the Alabama sentence of death and remand Mr. Heath to the Georgia penal officials to serve his sentence of life imprisonment.

III

IF THE DUAL SOVEREIGNTY EXCEPTION IS APPLIED TO SUCCESSIVE STATE PROSECUTIONS, IT SHOULD NOT BE INTERPRETED TO ALLOW MULTIPLE PROSECUTIONS BASED ON IDENTICAL CONDUCT PROSECUTED UNDER VIRTUALLY INDISTINGUISHABLE STATUTES SERVING IDENTICAL INTERESTS.

Should this Court decline to rule the dual sovereignty exception inapplicable to successive state prosecutions, it ought not to interpret the exception to allow for prosecutions based on the same conduct under virtually identical statutes serving identical interests. For all the reasons discussed in Part II, supra, successive state prosecutions do not pose the same problems as successive prosecutions involving the interaction of two fundamentally different governmental entities. The criminal laws of the various states pursue basically the same interests, inter-state cooperation apparently occurs (as this case demonstrates), and the frequency of prosecutions based on the same conduct is virtually nonexistent. Thus, it would be quite manageable to allow defendants the opportunity to demonstrate that the second (or third, etc.) prosecution they are facing will not further interests distinct from those served by earlier prosecutions.

Accordingly, given the important purposes of the double jeopardy clause, should the Court find the dual sovereignty

exception applicable to successive state prosecutions, at a minimum the Court should interpret the dual sovereignty exception to allow defendants to show that no separate state interests are being advanced by the subsequent prosecution or prosecutions. Mr. Heath has already demonstrated that the Alabama prosecution serves no separate interests, and the state has never even suggested that this is not true. Thus, his conviction should be reversed. Alternatively, his case should be remanded to allow him to make the required showing more completely.

CONCLUSION

Petitioner respectfully requests that, if the Court holds that his rights under the double jeopardy clause and the due process clause of the fourteenth amendment were violated by his being prosecuted by the state of Alabama for the same capital murder for which he was previously prosecuted by the state of Georgia, the Court reverse Petitioner's Alabama conviction for murder, and remand Mr. Heath to the Georgia authorities to continue serving his sentence of life imprisonment. Alternatively, this Court should remand this case to the Alabama courts to allow Mr. Heath to demonstrate that his prosecution in Alabama served no different interests from his prosecution in Georgia and thus that his double jeopardy rights were violated by his prosecution in Alabama.

Respectfully submitted,

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APPENDIX

APPENDIX A

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment, provides in part:

[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb. . . .

United States Constitution, Fourteenth Amendment, Section One, provides in part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Alabama Code § 13A-5-40 (1981) provides:

§ 13A-5-40. Capital offenses.

(a) The following are capital offenses:

(1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;

(2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

(3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;

(4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;

(5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contact or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosions;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined

in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section. (Acts 1981, No. 81-178, § 2.)

Alabama Code § 13A-5-45 (1981) provides:

§ 13A-5-45. Sentence hearing—Delay; statements and arguments; admissibility of evidence; burden of proof; mitigating and aggravating circumstances.

(a) Upon conviction of a defendant for a capital offense, the trial court shall conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death. The sentence hearing shall be conducted as soon as practicable after the defendant is convicted. Provided, however, if the sentence hearing is to be conducted before the trial judge without a jury or before the trial judge and a jury other than the trial jury, as provided elsewhere in this article, the trial court with the consent of both parties may delay the sentence hearing until it has received the pre-sentence investigation report specified in section 13A-5-47(b).

Otherwise, the sentence hearing shall not be delayed pending receipt of the pre-sentence investigation report.

(b) The state and the defendant shall be allowed to make opening statements and closing arguments at the sentence hearing. The order of those statements and arguments and the order of presentation of the evidence shall be the same as at trial.

(c) At the sentence hearing evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to the aggravating and mitigating circumstances referred to in sections 13A-5-49, 13A-5-51 and 13A-5-52. Evidence presented at the trial of the case may be considered insofar as it is relevant to the aggravating and mitigating circumstances without the necessity of re-introducing that evidence at the sentence hearing, unless the sentence hearing is conducted before a jury other than the one before which the defendant was tried.

(d) Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the state of Alabama.

(e) At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.

(f) Unless at least one aggravating circumstance as defined in section 13A-5-49 exists, the sentence shall be life imprisonment without parole.

(g) The defendant shall be allowed to offer any mitigating circumstance defined in sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall

have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. (Acts 1981, No. 81-178, § 7.)

Alabama Code § 13A-5-49 (1981) provides:

§ 13A-5-49. Aggravating circumstances.

Aggravating circumstances shall be the following:

(1) The capital offense was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to many persons;

(4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape robbery, burglary or kidnapping;

(5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital offense was committed for pecuniary gain;

(7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. (Acts 1981, No. 81-178, § 11.)

Alabama Code § 13A-5-50 (1981) provides:

§ 13A-5-50. Consideration of aggravating circumstances in sentence determination.

The fact that a particular capital offense as defined in section 13A-5-40(a) necessarily includes one or more

aggravating circumstances as specified in section 13A-5-49 shall not be construed to preclude the finding and consideration of that relevant circumstance or circumstances in determining sentence.

By way of illustration and not limitation, the aggravating circumstance specified in section 13A-5-49(4) shall be found and considered in determining sentence in every case in which a defendant is convicted of the capital offenses defined in subdivision (1) through (4) of subsection (a) of section 13A-5-40. (Acts 1981, No. 81-178, § 12.)

Alabama Code § 13A-6-2 (1977) provides:

§ 13A-6-2. Murder

(a) A person commits the crime of murder if:

(1) With intent to cause death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itelf. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by article 2 of chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by article 2 of chapter 5 of this title or any amendments thereto. (Acts 1977, No. 607, p. 812, § 2005.)

Alabama Code § 13A-6-43 (1977) provides:

§ 13A-6-43. Kidnapping in the first degree.

(a) A person commits the crime of kidnapping in the first degree if he abducts another person with intent to

(1) Hold him for ransom or reward; or

(2) Use him as a shield or hostage; or

(3) Accomplish or aid the commission of any felony or flight therefrom; or

(4) Inflict physical injury upon him, or to violate or abuse him sexually; or

(5) Terrorize him or a third person; or

(6) Interfere with the performance of any governmental or political function.

(b) A person does not commit the crime of kidnapping in the first degree if he voluntarily releases the victim alive, and not suffering from serious physical injury, in a safe place prior to apprehension. The burden of injecting the issue of voluntary safe release is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for or preclude a conviction of kidnapping in the second degree or any other crime.

(c) Kidnapping in the first degree is a Class A felony. (Acts 1977, No. 607, p. 812, § 2210.)

Alabama Code § 15-2-3 (1940) provides:

§ 15-2-3. Same—Offense commenced in state and consummated elswehere.

When the commision of an offense commenced in the slate of Alabama is consummated without the boundaries

of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law. (Code 1852, § 395; Code 1867, § 3943; Code 1876, § 4634; Code 1886, § 3718; Code 1896, § 4970; Code 1907, § 7227; Code 1923, § 4893; Code 1940, T. 15, § 93.)

Georgia Code § 26-1101 (1968) provided:

26-1101 Murder

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

(Acts 1968, pp. 1249, 1276.)

Georgia Code § 27-2528 (1973) provided:

27-2528 Sentence to life imprisonment or lesser punishment by judge on plea of guilty to an offense punishable by death

Any person who has been indicted for an offense punishable by death may enter a plea of guilty at any time after his indictment, and the judge of the superior court having jurisdiction may, in his discretion, during term time or vacation, sentence such person to life imprisonment, or to any punishment authorized by law for the offense named in the indictment: Provided, however, that the judge of the superior court must find one of the statutory aggravating circumstances provided in section 27-2534.1 before imposing the death penalty except in cases of treason or aircraft hijacking.

(Acts 1956, p. 737; 1973, pp. 159, 171.)

Georgia Code § 27-2534.1 (1973) provided:

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement.

(c) The statutory instructions as detrmined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at last one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed.

(Acts 1973, pp. 159, 163.)

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

LARRY GENE HEATH,
Petitioner,

v.

STATE OF ALABAMA,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Is the dual sovereignty doctrine applicable to successive prosecutions by two states for the same criminal conduct?

2. Has this Court's application of the dual sovereignty doctrine always turned solely on whether the two governments are sovereigns in the sense that each derives its power to prosecute from a source independent of the other?

3. Even if this Court were to adopt Petitioner's unprecedented comparison of interests test, should the Court bar Alabama's prosecution of Petitioner where Alabama has interests in the prosecution which are different from Georgia's and which were not satisfied by Petitioner's prosecution in Georgia.

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of Alabama is reported in *Ex parte Heath*, 455 So.2d 905 (Ala. 1984), and is set forth in the Joint Appendix, p. 93. Also set forth in the Joint Appendix, p. 78, is the earlier opinion of the Court of Criminal Appeals of Alabama, which is reported in *Heath v. State*, 455 So.2d 898 (Ala. Crim. App. 1983).

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of Alabama was entered on July 6, 1984. *Ex parte Heath*, 455 So.2d 905 (Ala. 1984). The petition for writ of certiorari was

timely filed within the extended time for filing on October 4, 1984.

However, jurisdiction existed only as to Issue II of the petition and the additional question this Court added. No jurisdiction existed as to the three other issues raised in the petition, because they were neither raised nor considered in the court below.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following constitutional and statutory provisions involved are set out in the Appendix:

United States Constitution, Fifth Amendment

Ala. Code, § 13A-5-39(1)

Ala. Code, § 13A-5-40

Ala. Code, § 13A-6-2

Ala. Code, § 15-2-3

Ga. Code, § 26-1101

STATEMENT OF THE CASE

Statement Of The Facts

Sometime during the late summer of 1981 Petitioner, a resident of Russell County, Alabama,[1] decided to have his then-pregnant wife, Rebecca Heath, killed (R. 543).[2] At the time Petitioner was involved in an affair with Denise Lambert, a resident of nearby Columbus, Georgia;[3] the

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[1] Russell County is located across the Chattahoochee River from the State of Georgia.

[2] References to the trial record, including transcript, will begin with "R.". References to the Joint Appendix will begin "J.A.".

[3] Columbus is located directly across the Chattahoochee River from Phenix City, Alabama, which is in turn located in Russell County, Alabama.

two were secretly engaged to be married (R. 575). After one failed attempt to arrange for the killing (R. 543), Petitioner, through his brother Jerry Heath, met with Charles "Slim" Owens in Owens's apartment in Columbus to discuss the killing (R. 544). Owens agreed to do the job for two thousand dollars, four hundred to be paid beforehand and the remaining sixteen hundred dollars to be paid afterwards (R. 549-550). The money used to pay for Rebecca Heath's death came from a finance company loan obtained over Rebecca Heath's signature.[4]

Several days after Petitioner went to Owens's apartment, Owens and another man met Petitioner outside Petitioner's office. The men were driving a Ford Mustang. Petitioner gave the other man one hundred dollars, and the next day brought him a .357 Magnum pistol to be used in abducting Rebecca Heath (R. 544). Petitioner also told the two men at this time that his wife would be driving him to work the next day, and instructed them to force their way into Rebecca Heath's car when she stopped at a certain corner (R. 544). Petitioner also supplied the men with three hundred dollars to be used to buy a car (R. 544).

Several days passed and nothing happened. Petitioner attempted to get in touch with Owens but was unable to do so (R. 545). When Petitioner reached Owens by telephone, he was told that the other man had disap-

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[4] The loan, for $2500.00, was applied for on August 12, 1981, and approved on August 13, 1981 (R. 568-570). Rebecca Heath was killed on August 31, 1981. Petitioner denied that the loan was obtained in order to pay his wife's killers; he admitted though that the money was used for that purpose (R. 704-705). Moreover, shortly before obtaining the loan Petitioner contacted the finance company twice about obtaining a loan but backed out both times when the finance company insisted on Petitioner's wife also signing for the loan (R. 570-571).

peared, but that a third man, Gregory Hughes Lumpkin,[5] would assist Owens in the killing. Lumpkin was the owner of the Ford Mustang (R. 545).

Around 2:00 a.m. on Monday, August 31, 1981, Owens called Petitioner at his home and told him that he and Lumpkin were ready (R. 545). According to the plan, Owens and Lumpkin were to abduct Rebecca Heath using the Heaths' car, a green Oldsmobile; at an appointed spot the car's steering wheel was to be secured with a strand of wire and a brick was to be placed on the accelerator of the car, and the Oldsmobile was to be run into a creek at high speed with Rebecca Heath inside to make it appear as though her death were an accident (R. 545-546). Petitioner, having placed the brick and the wire in the Oldsmobile (R. 545), left his and the victim's home, in Alabama, around 6:00 a.m. on August 31st and drove the Oldsmobile to Owens's apartment in Georgia to talk with Owens about the plan (R. 545). Then Petitioner drove to Denise Lambert's apartment to await a telephone call from Owens (R. 545). After Owens called around 7:15 or 7:30 a.m. Petitioner drove in the Oldsmobile, with Denise Lambert following in her pickup truck, to a gasoline station where he met Owens and Lumpkin, who were in the Mustang, just before 8:00 a.m. (R. 545). Petitioner turned the Oldsmobile over to one of the men and he got into Denise Lambert's truck (R. 545).

Then the two hired killers, driving the Oldsmobile and the Mustang, followed Petitioner and Denise Lambert to Petitioner's house on Sunderlan Drive in Russell County, Alabama (R. 545). When they arrived at Sunderlan Drive, Lumpkin, driving the Mustang, pulled up beside the truck, and Petitioner pointed out his house to the men and told them that they would have to get his wife from inside the house (R. 546.) Petitioner had left the

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[5] Lumpkin's name was not know to Petitioner, but he was a codefendant in the Georgia indictment (J.A. at 4).

house unlocked for this purpose and had also given Owens and Lumpkin the key to the house (R. 546). Petitioner's son Hamilton, then approximately two years old, was apparently in the truck with him when Petitioner gave Owens and Lumpkin the order to go in and get the boy's mother.[6] Petitioner, Hamilton, and Denise Lambert then drove to Lambert's apartment, and Petitioner later went to work (R. 546). Meanwhile, Rebecca Heath, a resident of Alabama, was abducted from her home in Alabama.

Around 9:00 a.m. on the same day, August 31, 1981, a Ford Mustang was seen in Troup County, Georgia, driving at a high rate of speed away from a spot where a green Oldsmobile was parked thirty to forty feet off the road (R. 334-336).[7] At 11:05 a.m. on the same day the body of Rebecca Heath, then nine months pregnant, was discovered inside the green Oldsmobile in Troup County (R. 340-341). A brick was found on the front floorboard of the Oldsmobile (R. 353), and a section of heavy electrical wire, about four to five feet long, was found on the back floorboard (R. 440). The cause of death was a gunshot wound to the right eye (R. 323). During the course of the autopsy the body of an eight pound, two ounce unborn baby boy was removed from Rebecca Heath's uterus; the baby was perfectly normal and under normal circumstances would have been delivered alive (R. 323).[8]

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[6] Petitioner stated in his confession that Hamilton was with him when Denise Lambert dropped him off at a service station afterwards (R. 546). Hamilton's grandfather, who now has custody of the boy, reported that Hamilton has had frequent nightmares during which he wakes up crying, "let me out of this truck" (R. 829). The boy has been under the care of a psychiatrist (R. 829).

[7] The spot in Troup County where the cars were seen is approximately fifty miles from Phenix City, Alabama (J.A. at 31).

[8] On August 26, 1981, five days before her death, Rebecca Heath paid $1,500.00 by check in advance to a group of doctors for the

On September 4, 1981, Petitioner was arrested and, after having been informed of his *Miranda* rights and having voluntarily waived those rights, gave a full confession admitting his involvement in his wife's kidnapping and murder (R. 458-483, 536-546). Petitioner claimed that he killed his wife because she would not give him a divorce on his terms and because he would be unable to obtain custody of his son Hamilton (R. 546-547, 829). However, several days later a number of insurance policies on the life of Rebecca Heath were found in Petitioner's luggage (R. 477). A total of $120,689.53 in life insurance proceeds was paid on account of the death of Rebecca Heath (R. 329);[9] Petitioner was the beneficiary on at least some and perhaps all of the policies (R. 331).

Proceedings Below

In November 1981 Petitioner was indicted by the Grand Jury of Troup County, Georgia, for the offense of malice murder. The indictment read as follows:

> . . . LARRY GENE HEATH [et al.] on the date of August 31, 1981, in the county aforesaid, did then and there unlawfully and with malice aforethought cause the death of Rebecca McQuire Heath, a human being, by shooting her with a gun, a deadly weapon.

(J.A. at 4). Contrary to Petitioner's assertion (Petitioner's brief, p. 2), the Georgia indictment was not the result of a joint investigation. While there was cooperation among the officials, Alabama's investigation was separate from Georgia's (R. 387-388).

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delivery of her baby. The check was written on a checking account she held jointly with Petitioner. Sometime after August 26th the payment on this check was stopped (R. 576-579).

[9] Petitioner initially told investigators that to his knowledge there was only one policy on Rebecca Heath's life, in the amount of $20,000.00 (R. 435).

On February 10, 1982, Petitioner entered a plea of guilty to the Troup County murder charge and received a sentence of life imprisonment (J.A. at 6).

On May 5, 1982, Petitioner was indicted by the Grand Jury of Russell County, Alabama, for the capital offense of murder during the course of a kidnapping in the first degree, as defined in Ala. Code, § 13A-5-40(a)(1). This indictment read as follows:

> The Grand Jury of said County charge that before the finding of this Indictment Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath's abduction of, or attempt to abduct, Rebecca Heath with intent to inflict physical injury upon her, in violation of § 13A-5-40(a)(1) of the Code of Alabama 1975, as amended, against the peace and dignity of the State of Alabama.

(J.A. at 7). Alabama's capital offense of kidnapping/murder is materially different from Georgia's capital offense of malice murder.[10]

On November 2, 1982, Petitioner's attorneys filed on his behalf a plea of autrefois convict and a plea of former jeopardy, both of which raised the issue of whether Petitioner's conviction and sentence in Georgia barred on double jeopardy grounds his prosecution in Alabama.

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[10] Alabama law no longer includes the element of malice in any type of homicide crime. *See*, Commentary to Ala. Code, § 13A-6-2. The closest counterpart in Alabama law to Georgia's capital offense of malice murder is Alabama's § 13A-6-2(a)(1) non-capital offense of intentional murder. Murder during a kidnapping in the first degree is a different offense under Alabama law, and is a capital offense. Section 13A-5-40(a)(1). The kidnapping in the first degree component is an essential element of the crime without which there can be no conviction and no life without parole or death sentence under § 13A-5-40(a)(1). *See, Ex parte Baldwin*, 372 So.2d 32, 33 (Ala. 1979); *see, Beverly v. State*, 439 So.2d 758, 762 (Ala. Crim. App.), *cert. denied*, No. 82-987 (Ala. 1983) (both decided under earlier version of Alabama's capital murder statute).

(J.A. at 8-11). The trial court, after a hearing and briefing by Petitioner's attorney, held that, assuming arguendo that the crimes in Georgia and Alabama were legally identical or that the Georgia offense could be considered a lesser included offense of the Alabama offense, double jeopardy did not bar prosecutions by two different states for the same act (J.A. at 12-14). The same two pleas were reasserted at trial and again rejected (J.A. at 54-57).

Petitioner was convicted by the jury on January 12, 1983, of murder during a kidnapping in the first degree (J.A. at 63). Subsequently a sentence hearing was held before the jury; after hearing the evidence and considering the aggravating and mitigating circumstances the jury made a sentence recommendation of death by a vote of twelve to zero (J.A. at 64). Pursuant to Alabama law a second sentence hearing was held before the trial court; after weighing aggravating and mitigating circumstances the trial court found that the aggravating circumstances outweighed the mitigating circumstances and, following the jury's recommendation, sentenced Petitioner to death on February 10, 1983 (J.A. at 69-74).

Appeal was automatic to the Alabama Court of Criminal Appeals. On July 5, 1983, that court affirmed Petitioner's conviction and death sentence, holding that the dual sovereignty doctrine applied to prosecutions by two states (J.A. at 78-90). An application for rehearing was overruled.

On August 10, 1983, Petitioner filed a petition for writ of certiorari in the Supreme Court of Alabama (J.A. at 91-92), which was automatically granted pursuant to Alabama law. On July 6, 1984, the Supreme Court of Alabama affirmed Petitioner's conviction and sentence and the decision of the Court of Criminal Appeals, holding that Alabama and Georgia were separate sovereigns and that the dual sovereignty doctrine thus allowed the two prosecutions of Petitioner (J.A. at 93-96).

SUMMARY OF THE ARGUMENT

Under the dual sovereignty doctrine as firmly established by this Court the fundamental question is whether each government derives its power to prosecute from a source independent of the other government. If so, the governments are separate sovereigns within the meaning of the dual sovereignty doctrine, and a violation of the law of each is a separate offense for the purpose of the Double Jeopardy Clause. Based on this analysis the Court has previously decided that a state and the federal government are separate sovereigns because each derives its authority to prosecute from its own constitution. Because states derive their authority to prosecute from their individual constitutions they are separate sovereigns in relation to each other; thus the dual sovereignty doctrine applies to successive state prosecutions, and such prosecutions do not violate double jeopardy. Alabama's prosecution of Petitioner did not, therefore, violate double jeopardy.

The dual sovereignty doctrine, as developed by this Court, has never involved an analysis and comparison of the interests of the prosecuting governments. The adoption of this type of analysis in the case of successive state prosecutions would be inconsistent with settled law regarding prosecutions by other governments. A test based on comparison of interests would be very problematical in its application, and would inevitably lead to confusion among law enforcement officials. The adoption of a test based on interests in the area of state/state prosecutions would also undermine the well-settled rule in the area of federal/state prosecutions.

Even if the unprecedented comparison of interests test Petitioner espouses were adopted, Alabama's prosecution of Petitioner would still not violate double jeopardy principles. The Alabama statute under which Petitioner was prosecuted provided a minimum punishment which was greater than the life sentence Petitioner received in Geor-

gia. In addition, by seeking the death penalty where Georgia did not, Alabama expressed its view that Petitioner's crime was more serious than Georgia considered it. Therefore Alabama's interests were different from Georgia's and were not served by Georgia's prosecution.

ARGUMENT

I. THE DUAL SOVEREIGNTY DOCTRINE IS APPLICABLE TO SUCCESSIVE PROSECUTIONS BY TWO STATES FOR THE SAME CRIMINAL ACT, BECAUSE A STATE, DERIVING ITS POWER TO PROSECUTE FROM ITS OWN CONSTITUTION, IS A SOVEREIGN WITHIN THE MEANING OF THE DUAL SOVEREIGNTY DOCTRINE.

A. Two Governments Are Separate Sovereigns, And The Dual Sovereignty Doctrine Is Therefore Applicable, Where Each Derives Its Power To Prosecute From A Source Independent Of The Other Government.

The Double Jeopardy Clause of the Fifth Amendment provides as follows:

> . . . ; nor shall any person be subject for the *same offense* to be twice put in jeopardy of life or limb; . . . .

(emphasis added). In *Moore v. Illinois*, 55 U.S. (14 How.) 13 (1852), this Court considered the question of whether one act may constitute two different offenses, within the meaning of the Double Jeopardy Clause, where the act violates the law of two different sovereigns. In determining that such a situation would not constitute double jeopardy, this Court stated as follows:

> The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same of-

> fense; but only that by one act he has committed two offenses, for each of which he is justly punishable.

55 U.S. at 20. This rule was approved in subsequent cases. *United States v. Cruikshank*, 92 U.S. 542, 550-551 (1875); *Ex parte Siebold*, 100 U.S. 371, 389-391 (1879); *Cross v. North Carolina*, 132 U.S. 131, 139 (1889); *Pettibone v. United States*, 148 U.S. 197, 209 (1893); *Crossley v. California*, 168 U.S. 640, 641 (1898); *Southern Railway Co. v. Railroad Commission of Indiana*, 236 U.S. 439, 445 (1915); *Gilbert v. Minnesota*, 254 U.S. 325, 330 (1920); *McKelvey v. United States*, 260 U.S. 353, 358-359 (1922). It emerged as clear constitutional doctrine in *United States v. Lanza*, 260 U.S. 377 (1922).[11] In *Lanza* the defendant sought to use a prior state conviction to bar a federal prosecution based on the same acts. The Court, relying on *Moore*, held that double jeopardy did not prevent the federal prosecution.

> [The states'] laws derive their force . . . from the power originally belonging to the states, preserved to them by the 10th Amendment, ...
>
> * * * *
>
> We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. . . . Each government, in determining what shall be an offense against its peace and dignity, is exercising its own sovereignty, not that of the other.
>
> It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both, and may be punished by each. . . . Here the same act was an offense against the state of Washington, because a

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[11] Petitioner describes the dual sovereignty doctrine as "an exception to the normal rules of double jeopardy" (Petitioner's brief, p. 22). In *United States v. Wheeler*, 435 U.S. 313, 330 (1978), however, the Court characterized the doctrine as arising from the "very words of the Double Jeopardy Clause."

> violation of its law, and also an offense against the United States under the National Prohibition Act. *The defendants thus committed two different offenses by the same act, and a conviction by the court of Washington of the offense against that state is not a conviction of the different offense against the United States, and so is not double jeopardy.*

260 U.S. at 381-382 (emphasis added). The holding of *Lanza*, that double jeopardy does not apply where there are state and federal prosecutions, was reaffirmed in *Abbate v. United States*, 359 U.S. 187, 195 (1959).

Since *Abbate* the Court has twice considered whether the dual sovereignty doctrine applied to prosecutions for the same act by two governments. In *Waller v. Florida*, 397 U.S. 387 (1970), the Court held that the dual sovereignty doctrine did not apply to prosecutions by a Florida municipality and the State of Florida, because under Florida law municipalities are creations of the state; thus municipalities and the state derive their power from the same source and are not separate sovereigns. 397 U.S. at 392-394. That the dual sovereignty doctrine turned on whether the two governments derived their prosecutorial power from the same source was further underscored in *United States v. Wheeler*, 435 U.S. 313 (1978). In *Wheeler* the Court held that where the power to prosecute Indian tribal offenders was a part of inherent tribal authority, rather than an aspect of the sovereignty of the federal government delegated to the tribe by Congress, the tribe was a separate sovereign under the dual sovereignty doctrine. As a result, and because of the dual sovereignty doctrine, the Double Jeopardy Clause did not bar a prosecution by the federal government where the defendant had already been prosecuted for a lesser included offense in a tribal court.[12]

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[12] Petitioner asserts that the dual sovereignty doctrine arose in pre-civil war times to resolve the state and federal conflicts of that period. This fails to explain the continuation of the doctrine

In the cases addressing the state/federal situation, *Moore*, *Lanza* and *Abbate*, this Court recognized that because the state and federal governments had separate sources of power to prosecute they were separate sovereigns in relation to each other and therefore could successively prosecute the same act without violating the Double Jeopardy Clause. In two cases involving other governmental entities, *Waller* and *Wheeler*, this Court closely examined the relationship between the entities to determine whether they derived their power from the same source. Most importantly, both classes of cases evidenced a single, consistent approach. In all five cases the application of the dual sovereignty doctrine depended solely on whether the two governments actually derived their power to prosecute from separate sources and were thus separate sovereigns. If they were separate sovereigns then the violation of the law of each was a separate offense, and the Double Jeopardy Clause was not violated.[13] In no area of constitutional law have this Court's decisions reflected a more consistent, straightforward analytical approach.

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in *Lanza* (1922) and *Abbate* (1959), and the application of the dual sovereignty doctrine in *Wheeler*, where there was no question of federalism. Petitioner also points out that *Abbate* was decided prior to the Fifth Amendment's being held applicable to the states; this is irrelevant because in *Abbate* the second prosecuting party was the federal government, to whom the Fifth Amendment was clearly applicable.

[13] Both before and after *Lanza* the Court decided in *Puerto Rico v. Shell Co.*, 302 U.S. 253 (1937), and *Grafton v. United States*, 206 U.S. 333 (1907), that a territorial government and the federal government were not separate sovereigns because a territory simply exercised authority granted to it by the federal government. The same, of course, cannot be said about two states.

B. This Court Has Never Applied The Dual Sovereignty Doctrine Based On Whether The Two Prosecutions Served Different Interests. Instead The Doctrine Has Always Been Applied Based On Whether The Two Governments Involved Were Separate Sovereigns Deriving Their Power To Prosecute From Different Sources.

Petitioner argues at length that the dual sovereignty doctrine should only be applied where the governments involved are pursuing diverse interests. This view of dual sovereignty should be rejected because it is inconsistent with the specific holdings of all of this Court's dual sovereignty decisions.

The foundation of the dual sovereignty doctrine is the principle that where one act violates the laws of two different sovereigns two different offenses are committed. *United States v. Lanza*, 260 U.S. at 382; *Moore v. Illinois*, 55 U.S. at 20. This principle stems from the common law conception of a crime as an offense against the sovereignty of government. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1310, 1316 (1932). The important question in the dual sovereignty cases has always been whether the two governments were actually separate sovereigns; in other words, whether they derived their power to prosecute from different sources. *United States v. Wheeler*, 435 U.S. at 320. Based on this definition of sovereignty this Court has held that the federal government and the states are separate sovereigns in relation to each other. *Abbate v. United States*, *supra*; *United States v. Lanza*, *supra*; *Moore v. Illinois*, *supra*. The Court has also held that because territorial governments derive their authority from the federal government and municipal governments derive their authority from state governments, these governmental entities are not sovereigns in relation to one another. *Waller v. Florida*, *supra*; *Puerto Rico v. Shell Co.*, 302 U.S. 253, 264-265 (1937); *Grafton v. United States*, 206 U.S. 333, 353-355 (1907).

In its dual sovereignty cases the focus of this Court's analysis was on the concept of sovereignty, meaning that each government derives its power to prosecute from an independent source, and not on the various interests of the governments involved. This same analysis has consistently been applied by the lower federal courts in the dual sovereignty context. *See, E.g., United States v. NG*, 699 F.2d 63 (2nd Cir. 1983); *Pope v. Thone*, 671 F.2d 298 (8th Cir.), *cert. denied*, 457 U.S. 1140 (1982); *Delay v. United States*, 602 F.2d 173 (8th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *Brown v. United States*, 551 F.2d 619 (5th Cir. 1977). The so-called *Petite* policy, under which the local federal prosecutor must convince the United States Department of Justice of an unsatisfied federal interest after there has been a state prosecution, is not a rule of constitutional law. *United States v. NG, supra*; *Pope v. Thone, supra*; *see, Delay v. United States, supra*.[14]

Moreover, if an analysis of the interests involved had been the real basis for the dual sovereignty line of cases, then *United States v. Lanza, supra*, perhaps the leading case in this area of the law, would have been decided differently. In *Lanza* the defendant had been convicted in state court of manufacturing, transporting, and possessing liquor. 260 U.S. at 379. He was then indicted in federal court for manufacturing, transporting, and possessing the same liquor, and for possessing a still and materials for a still. 260 U.S. at 378. All of the federal charges were dismissed on the ground that prosecution of them would constitute double jeopardy. 260 U.S. at 379. This Court reversed, holding that because each government derived its power from a different source, the governments were separate sovereigns; thus the defendant's

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[14] Petitioner's recitation of various states that, by *statute or case law*, bar two prosecutions by different sovereigns in *some* cases (Petitioners brief, p. 18 n. 6) only serves to underscore that such rules are not of constitutional origin.

acts constituted separate offenses and double jeopardy did not apply. 260 U.S. at 381-382.

In *Lanza* the statutes were identical, with the exception of the additional charges in federal court of possessing a still and materials for a still. No different interests were noted by the Court. If a comparison of interests had been the basis of the Court's decision, the result in *Lanza* would have been different. The Court meant what it said in *Lanza*: where the sources of power are distinct, separate sovereigns are involved, and there is no violation of the Double Jeopardy Clause.

Petitioner claims that this Court has moved toward an analysis based on interests in its most recent decisions, *Waller* and *Wheeler*. The position taken by Petitioner is based on a fundamental misreading of those cases.

In *Waller* the defendant had, with others, removed a canvas mural from a wall in the St. Petersburg city hall and carried it through the streets. 397 U.S. at 388. When the defendant and the others were accosted by officers a scuffle resulted and the mural was damaged. *Id.* The defendant was charged by the City of St. Petersburg with destruction of city property and disorderly breach of the peace; he pleaded guilty to both charges. *Id.* Subsequently the defendant was charged by the State of Florida with grand larceny and convicted. *Id.* The Florida appellate court acknowledged that all charges were based on the same facts; assumed without holding that the municipal ordinances were lesser included offenses of the state crime; and held that even if the offenses were identical the municipal prosecutions were not a bar to the state prosecution. *Id.* at 389.

This Court reversed, holding that since a municipality shared its source of power with the state the municipality could not be considered a separate sovereign and the dual sovereignty doctrine was not applicable. *Id.* at 392-395. The Court limited its holding as follows:

> We decide only that the Florida courts were in error to the extent of holding that—'even if a person has been tried in a municipal court for the identical offense with which he is charged in a state court, this would not be a bar to the prosecution of such person in the proper state court.'

Id. at 395. In its disposition of *Waller* the Court was in no way suggesting that the second prosecution was barred because the interests at stake in both prosecutions were identical. Instead, in that part of the opinion Petitioner relies on, this Court was simply acknowledging the possibility that, under the facts of that case, a lower court could find that the offenses involved were not based on the same facts and that the municipal ordinances were not lesser included offenses of the state offense.

In *Wheeler* the Court, after extensively considering the nature and source of an Indian tribe's authority to prosecute, 435 U.S. at 322-330, determined that because this authority is not derived from the federal government, tribes are sovereigns in relation to the federal government. Prosecutions by a tribe and the federal government for the same offense are therefore permitted under the dual sovereignty doctrine. *Id.* at 329-333. At the end of the opinion this Court did note as a secondary matter that the tribal courts protect certain interests which might not be served by federal prosecutions. *Id.* at 331-332. The Court made plain, however, that the basis for its decision was the settled concept that the laws of two different sovereigns are distinct offenses for purposes of the Double Jeopardy Clause.

> In Bartkus v. Illinois, 359 U.S. 121 and Abbate v. United States, 359 U.S. 187 this Court reaffirmed the well-established principle that a federal prosecution does not bar a subsequent state prosecution of the same person for the same acts, and a state prosecution does not bar a federal one. The basis for this doctrine is that prosecutions under the laws of separate sovereigns do not, in the language of the Fifth

Amendment, 'subject [the defendant], for the same offence to be twice put in jeopardy':

> 'An offence, in its legal significance, means the transgression of a law. . . . Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offense or transgression of the laws of both. . . . That either or both may (if they see fit) punish such an offender, cannot be doubted. Yet it cannot be truly averred that the offender has been twice punished for the same offence; but only that by one act he has committed two offences, for each of which he is justly punishable.' Moore v. Illinois, 14 How. 13, 19-20.

435 U.S. 316-317.

* * * *

Bartkus and Abbate rest on the basic structure of our federal system, in which States and the National Government are separate political communities. State and Federal Governments '[derive] power from different sources,' each from the organic law that established it. United States v. Lanza, 260 U.S. 377. Each has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses, and in doing so each 'is exercising its own sovereignty, and not that of the other.' Ibid.

435 U.S. at 320.

* * * *

The respondent contends that, despite the fact that successive tribal and federal prosecutions are not 'for the same offence,' the 'dual sovereignty' concept should be limited to successive state and federal prosecutions. But we cannot accept so restrictive a view of that concept, a view which, as has been noted, would require disregard of the very words of the Double Jeopardy Clause.

435 U.S. at 330. Thus the Court's holding in *Wheeler* expressly turned on the question of whether each government derived its power to prosecute from a source independent of the other governments, and not on any notion of interests.[15]

Because the position urged by Petitioner is so clearly contrary to the plain language of this Court's several decisions on dual sovereignty, Petitioner's argument is in reality an attack on this settled doctrine, despite Petitioner's disclaimer (Petitioner's brief, p. 34). If this Court were to hold that the application of the dual sovereignty doctrine to successive state prosecutions depends on a comparison of interests, this Court would undermine the well-established and expressly stated basis of the dual sovereignty doctrine in any context. Such a decision would subtract clarity from and destroy consistency in an important area of constitutional law.[16]

C. The Dual Sovereignty Doctrine Established By This Court Is Logically And Conceptually Sound.

At pages 31 through 35 of his brief Petitioner argues that the Court has not clearly and logically stated what is meant by "sovereignty" in the context of the dual sovereignty cases. In so doing Petitioner ignores the plain language of these cases.

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[15] At most it could be said that there are two independent holdings in *Wheeler*, both of which are of equal authority. *See, Union P.R. Co. v. Mason City and Ft. Dodge R. Co.*, 199 U.S. 160 (1905).

[16] Petitioner suggests that *Fox v. Ohio*, 46 U.S. (5 How.) 410 (1847) and *United States v. Marigold*, 50 U.S. (9 How.) 560 (1850), were early cases which allowed two prosecutions only because different interests were involved. This Court, however, has interpreted these cases as being a part of the dual sovereignty line of cases which allows two prosecutions if separate sovereigns are involved. *Abbate v. United States*, 359 U.S. at 190-192; *United States v. Lanza*, 260 U.S. at 383; *Moore v. Illinois*, 55 U.S. (14 How.) at 20.

All of the Court's dual sovereignty cases have turned upon the answer to a single question—what is the ultimate source of power on which the respective prosecutions were based? If the Court found that the two governments derived this power from independent sources, then they were sovereigns in relation to each other within the meaning of the dual sovereignty doctrine. If, on the other hand, the power to prosecute emerged from the same source, the governments were not separate sovereigns and dual sovereignty did not apply. Thus in *Lanza*, *Abbate*, and *Wheeler*, the Court found that the power of each government to prosecute had its origin in a source distinct from the other government, whereas in *Waller*, *Shell Co.*, and *Grafton*, one government was in reality a creation of the other government and thus they shared the source of power. If there was any confusion about the basis for this Court's decisions it was put to rest in *Wheeler*.

> We think that the respondent and the Court of Appeals, in relying on federal control over Indian tribes, have misconceived the distinction between those cases in which the 'dual sovereignty' concept is applicable and those in which it is not. It is true that Territories are subject to the ultimate control of Congress, and cities to the control of the State which created them. But that fact was not relied upon as the basis for the decisions in Grafton, Shell Co., and Waller. What differentiated those cases from Bartkus and Abbate was not the extent of control exercised by one prosecuting authority over the other, but rather the ultimate source of the power under which the respective prosecutions were undertaken.

435 U.S. at 319-320.

Furthermore, the basis for the Court's decisions on dual sovereignty is logical. In *Waller*, *Shell Co.*, and *Grafton* this Court recognized that territories and municipalities owe their existence to, respectively, the federal

and state governments. Accordingly territories are but arms of the federal government, and municipalities are but arms of the state government; in each case the courts of a dependent government exercise the jurisdiction and authority of an independent government. Because the source of judicial power is the same an offense against the dependent government must be deemed an offense against the independent government.

The relationship between two sovereign governments is fundamentally different. A state derives its power to prosecute from its own constitution, *United States v. Wheeler*, 435 U.S. at 320, and its power to prosecute is recognized in the Tenth Amendment to the United States Constitution, *United States v. Lanza*, 260 U.S. at 381-382. The federal government derives its authority to prosecute from the federal constitution. *United States v. Wheeler*, 435 U.S. at 320. The authority of Indian tribes to prosecute is their "primeval sovereignty," *United States v. Wheeler*, 435 U.S. at 328, which, until Congress strips away this authority, makes the tribes sovereign for the purposes of the dual sovereignty doctrine. *Id.* One criminal act can logically be and has consistently been deemed two offenses under double jeopardy where it violates the duty owed to two different sources of power, or sovereigns. As was previously mentioned, this is consistent with the common law idea of crime as an offense against the sovereignty of government. Grant, *The Lanza Rule of Successive Prosecutions*, 32 Colum. L. Rev. 1309, 1310, 1316 (1932).

Petitioner argues on pp. 33-34 of his brief that this Court's distinction between states and territories for the purposes of the dual sovereignty doctrine is unreasonable. His argument ignores the theoretical basis of our United States. The states which existed before the adoption of the Federal Constitution originally possessed all of the attributes of sovereignty, and they still retain

those attributes, except as they have been surrendered by the formation of the Constitution and the Amendments thereto. *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867). New states, upon their admission to the Union, become invested with equal rights and are subject only to the same restrictions as the original states. *Id.*

Moreover, the conclusions reached in the dual sovereignty cases concerning states, territories, and Indian tribes are consistent with other declarations of this Court. Regarding states, this Court has recognized that each state is endowed with all of the functions essential to a separate and independent existence. *Lane County v. Oregon*, 74 U.S. (7 Wall.) 71 (1869). Thus the states are sovereign within their own limits and foreign to each other. *Bank of the United States v. Daniel*, 37 U.S. (12 Pet.) 32 (1838). One of the sovereign interests of a state is the exercise of sovereign power over the individuals and entities within its jurisdiction, including the power to create and enforce a criminal code. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982). The power to punish is a mark of sovereignty. *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819).

As pertains to Indian tribes the Court has stated that tribes are unique aggregations possessing attributes of sovereignty, *United States v. Mazurie*, 419 U.S. 544, 557 (1975), with the power of regulating their internal and societal relations. *McClanahan v. Arizona State Tax Com.*, 411 U.S. 164, 173 (1973).

A territory, on the other hand, owes its existence to the United States, and its judicial tribunals exert all their power by authority of the United States. *Puerto Rico v. Shell Co.*, 302 U.S. at 265. Thus the dual sovereignty theory, as applied, is consistent with the attributes of sovereignty previously recognized by the Court.

D. The Application Of The Dual Sovereignty Doctrine Has Not Been And Should Not Be Limited To Governments Of Overlapping Territorial Jurisdiction.

Petitioner suggests on p. 36 of his brief that the dual sovereignty doctrine should be limited to those situations where two sovereigns with overlapping territorial jurisdiction both seek to try a defendant for one criminal act which violates the law of each. This doctrine, as consistently applied in *Moore*, *Lanza*, *Abbate*, and *Wheeler*, admits no such limitation. As has been repeatedly stated above, the crucial question in all of these cases is whether the two governments derive their power to prosecute from the same source. If so, then they are sovereigns within the meaning of the dual sovereignty doctrine. If, on the other hand, the two governments have the same source of power to prosecute, then they are not sovereigns and double jeopardy bars the second prosecution. In none of the cases in which the dual sovereignty doctrine has been considered, neither those in which the doctrine has been applied, *Moore*, *Lanza*, *Abbate*, and *Wheeler*, nor those in which the dual sovereignty doctrine was found to be inapplicable, *Grafton*, *Shell Co.*, and *Waller*, has the nature of the governments' jurisdiction been considered important.

Petitioner's argument that the possibility of intergovernmental interference is less in the state/state context than in the federal/state context is simply for the same reasons irrelevant to the test for sovereignty established by the Court. Moreover, even if the possibility of intergovernmental interference were a consideration, the possibility of conflicts arising out of prosecutions among the fifty states, most of which border two or more other states, is easily as great as if not greater than the possibility of interference between an Indian tribe and the federal government, a situation to which the dual sovereignty doctrine is applicable under *Wheeler*.

Because the fundamental question in the application of the dual sovereignty doctrine is whether the governments are in fact separate sovereigns, the doctrine should apply whenever two sovereigns have concurrent subject matter jurisdiction over the same criminal act irrespective of whether their territorial jurisdictions overlap.

E. Because States Derive Their Authority To Prosecute From Independent Sources, They Are Sovereigns Within The Meaning Of The Dual Sovereignty Doctrine, And Successive Prosecutions By States For The Same Criminal Act Are Not Barred By Double Jeopardy.

It has been shown, *supra*, that the application of the dual sovereignty doctrine depends on whether the governments involved derive their power to prosecute from different sources. *United States v. Wheeler*, 435 U.S. at 319-320. If they do, then they are separate sovereigns, and the dual sovereignty doctrine applies to allow successive prosecutions by the governments for the same criminal act. *Id.* With this question as the focus of analysis it has been consistently held that states are sovereigns in relation to the federal government, *United States v. Lanza*, 260 U.S. at 382; *Abbate v. United States*, 359 U.S. at 189-195, because states derive their authority to prosecute from their own constitutions. *United States v. Wheeler*, 435 U.S. at 320.

With the holdings of *Lanza*, *Abbate*, and *Wheeler* together forming the standard by which to judge prosecutions by other pairs of governments, it is simply irrefutable that the dual sovereignty doctrine applies to successive prosecutions by two states. Each state here, Alabama and Georgia, derives its power to prosecute from its own constitution; *United States v. Wheeler*, 435 U.S. at 320; thus neither of these states derives its authority to prosecute from the other. Alabama and Georgia, and any other states, are therefore separate sovereigns, and under the dual sovereignty doctrine successive prosecutions by

them, or by any other states, is not barred by double jeopardy. *Wiley v. Altman*, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 371 (N.Y. App. 1981); *State v. James*, 203 Md. 113, 100 A.2d 12 (1953); *People v. Walker*, 123 Cal. App. 3d 981, 177 Cal. Rptr. 147 (1981); *Hernandez v. State*, 397 So.2d 715 (Fla. App. 1981); *State v. Brown*, 441 N.E.2d 1126 (Ohio App. 1981); *State v. Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981); *State v. Glover*, 500 S.W.2d 271 (Mo. App. 1973); *see*, *Goldsmith v. Cheney*, 447 F.2d 624, 628 n. 3 (10th Cir. 1971).[17]

In *Wheeler* this Court made clear that the dual sovereignty doctrine is applicable to cases beyond the federal/state context where, under the doctrine established in *Moore*, *Lanza*, and *Abbate*, the prosecuting governments are in fact separate sovereigns. The Court in *Wheeler* recognized the sovereign status of an Indian tribe whose right to prosecute could at any time be eliminated by Congress. There is no logical reason not to extend the dual sovereignty doctrine to states, whose power to prosecute, arising from their own constitutions, is recognized by the 10th Amendment. *United States v. Wheeler*, 435 U.S. at 320. Because the dual sovereignty doctrine must be applied to successive state prosecutions, Alabama's prosecution of Petitioner is not barred by double jeopardy.

F. By Adopting The Interest Test Urged By Petitioner The Court Would Move From A Definite And Readily Applicable Doctrine To One Fraught With Uncertainty And Confusion.

As has been demonstrated *supra*, the Court in all of its dual sovereignty decisions has applied an analysis

[17] At page 20 of his brief Petitioner suggests that in *State v. Straw*, *supra*, the Tennessee court only allowed a second prosecution because the defendant received a light sentence in another state. While the Tennessee court mentioned the light sentence, it held that the dual sovereignty doctrine applied to all successive state prosecutions and therefore that the Fifth Amendment did not bar the second prosecution.

based on the concept of sovereignty which is inconsistent, both in substance and in result, with the interest test suggested by Petitioner. For that reason alone this Court should reject Petitioner's argument. There are, however, practical reasons for this Court to refuse to apply an interest-based analysis in the state/state context.

Petitioner argues on p. 37 of his brief that the application of an interest-based analysis to prosecutions between two states will usually result in the second prosecution being prohibited because "the social interests at stake will virtually always be satisfied by a single prosecution of a particular crime." A short inquiry into the nature of any comparison of interests will illustrate that the matter is far more problematic than Petitioner suggests.

Initially it is necessary to consider what questions would be involved in any comparison of interests. Interests, according to Petitioner, are reasons for the prosecution.[18] Petitioner speaks also of interests being served or satisfied.[19] Thus any comparison of interests would involve at least two questions (1) What interest is protected by the law of each state? and (2) Would the interest of the second state be sufficiently served by the first state's prosecution?

Consider the question of what interest is involved in a prosecution. In a very real sense, each state has an interest in all its prosecutions which is essentially different from that of any other state—the preservation of its own peace and dignity. *See, United States v. Lanza*, 260 U.S. at 382. No state can act for another in protecting this interest. In a very basic sense therefore the assertion of concurrent interests is an illusion.

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[18] At page 36 of his brief Petitioner argues that a state's interest in prosecution is the protection of "the safety of citizens, their property and the public morals."

[19] Petitioner's brief, pp. 37 and 39.

To the extent that a more specific inquiry into interests is required, this will sometimes be difficult or impossible. While in many cases the interest, in the sense of the purpose for the statute, will be obvious from a reading of it, in other cases the intent may not be so clear. Published legislative reports may well reveal legislative purposes, but these are seldom available for state government.[20] Discovering a particular state's exact interest may thus be an unsure endeavor.

Even if a state's interest can be learned, deciding whether one state's interest is satisfied by another state's prosecution is more difficult. First it must be determined what is meant by the question itself. Petitioner seems to say that where the states' interests are identical one state's prosecution will always serve another state's interest regardless of a difference in the punishment that could be imposed.[21] Yet it cannot be said that interests of a state are satisfied where the defendant received a significantly lighter sentence for his crime in another state. Suppose a defendant commits a particular type of murder on the border of two states in such a way that both states have jurisdiction, as in Petitioner's case. The first state to prosecute has no death penalty whereas the second state does. Both states have recognized a social interest in prohibiting murders by punishing those who commit them; the second state has indicated that this crime is one which may deserve this penalty "unique in its severity and irrevocability," *Gregg v. Georgia*, 428 U.S. 153, 187 (1976), while the first state has in effect said that no crime deserves such a penalty. Would the

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[20] With the exception of legislative copies of bills and legislative journals (usually containing only names and dates), very few states publish prepassage materials comparable to the documents available at the federal level. Foster & Boast, *Subject Compilations of State Laws*, 8 n. 5 (Greenwood Press 1981).

[21] Petitioner's brief, p. 37, arguing against repeated prosecution to obtain greater punishment.

second state's interest, which involves not only its prohibition of murder but also its decision on punishment, be satisfied by the first state's prosecution? Definitely not.[22]

If it is accepted that a state's interest may not be served by a lesser sentence than the state would have imposed, then the matter becomes more complicated. Suppose two adjoining states, A and B, have identically worded statutes prohibiting conspiracy to distribute marijuana, a crime which could easily extend to two or more states. In A this crime carries a penalty of from one to ten years in prison; in B, less tolerant of marijuana, the term is ten years to life. A defendant is prosecuted in A and receives a 5-year sentence. Is B's interest served? Obviously not, because the defendant would have received at least five years more in B. But what if A had given him ten years? He could receive many more years in B, or he could receive the identical sentence. Is B's interest in the *possibility* of a greater sentence a sufficient interest to allow prosecution? What if the different sentence ranges are instead one to twenty years for A versus ten to forty years for B, and the defendant receives a twenty year sentence in A. Prosecution by B might result in a much longer sentence, but it might instead result in a sentence only less than or equal to that imposed by A, making B's sentence in effect a nullity. Should a court find that B's chance of imposing a longer sentence is counterbalanced by the possibility of B obtaining a sentence only less than or equal to the sentence imposed by A, and thus that by the law of averages B's interest really equals zero? Should statistics on average sentences imposed in B for this crime be considered? What if under both states' laws

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[22] If Petitioner's argument were accepted the second state's interest would rarely be served because almost any defendant would plead guilty to a term of years rather than face a death sentence.

the defendant is a habitual offender? Under A's statutory scheme he received a life sentence, but in B the mandatory sentence is life without parole. Would the possibility of the defendant receiving parole in A give B an interest that would justify its prosecution? [23]

It is obvious that the application of an interest-based test is far more difficult than Petitioner suggests. In the somewhat limited area of state/state prosecutions the adoption of Petitioner's position would lead to a stream of questions, and cases, for this Court and the lower courts to decide. If the area of inquiry is expanded to the federal/state context, an area where this Court has noted the difficulty of a comparison of interests, *Bartkus v. Illinois*, 359 U.S. 121, 138 (1959),[24] overlapping territorial jurisdiction would give rise to a much greater number of such cases and questions.

Furthermore the confusion generated by the rejection of a clearly defined and logical rule of law and its replacement by murky language that must be clarified on a case by case basis will hinder thorough and effective law enforcement. Prosecutors may find it necessary to rush their cases to trial rather than risk being precluded under a uncertain test. Defense attorneys, gambling where the law is not clear that a second prosecution will be barred, may encourage their clients to plead guilty in the state giving their clients the best deal, and prosecutors may be anxious to make those deals, even

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[23] If the Court ventures into this analysis of interests, eventually it will be argued that the defendant's "interests" should be considered. Then the analysis will not only involve ascertaining the state's interests and determining whether they are satisfied, but also whether the state's unsatisfied interests outweigh the defendant's interests.

[24] As was argued above, an application of an analysis of interests in the state/state context would surely lead to the argument that it be applied in the federal/state context.

to lesser included offenses, rather than take a chance on being beaten to the courthouse by another state.[25]

In short, the confusion generated by the adoption of an interest test is sufficient reason in and of itself to reject Petitioner's argument.

II. EVEN IF THE DUAL SOVEREIGNTY DOCTRINE IS APPLIED TO SUCCESSIVE STATE PROSECUTIONS ONLY WHERE THE STATES HAVE DIFFERENT INTERESTS, PETITIONER'S CONVICTION AND SENTENCE SHOULD BE AFFIRMED BECAUSE ALABAMA HAS INTERESTS IN THE PROSECUTION WHICH ARE DIFFERENT FROM THOSE OF GEORGIA AND WHICH WERE NOT SATISFIED BY GEORGIA'S PROSECUTION.

Respondent has consistently maintained and continues to maintain that the sole question relevant to the application vel non of the dual sovereignty doctrine to successive prosecutions by two governments is whether or not each government derives its authority to prosecute from a source independent of the other government. If the sources of power are independent, then the governments are sovereigns in relation to one another and the dual sovereignty doctrine applies. In the case at bar each state has as the source of power its own organic law, *United States v. Wheeler*, 435 U.S. at 320; thus Alabama and Georgia are sovereigns and double jeopardy does not bar Alabama's prosecution and conviction of Petitioner.

If, however, this Court should apply the dual sovereignty doctrine to successive state prosecutions only where the interests of the second state are different from those of the first state or have not been satisfied by the first state's prosecution, then this Court should still affirm

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[25] In this sense guilty pleas would be encouraged. But extension of the present doctrine to the state/state situation would not discourage guilty pleas; the possibility of prosecution in a second state would have no effect on plea bargaining in a first state.

Petitioner's conviction and sentence because Alabama's interests in its prosecution of Petitioner are different from Georgia's and its interests were not satisfied by Georgia's prosecution.

Alabama has an interest in seeing that persons who violate its laws receive the degree of punishment provided under Alabama law. Petitioner was convicted of the capital offense of murder during a kidnapping in the first degree, which is punished either by death or life imprisonment without parole.[26] Ala. Code, § 13A-5-39(1) (Appendix). Thus upon conviction in Alabama Petitioner would necessarily receive a punishment greater than his life sentence in Georgia. Because Alabama's punishment is greater, its interest was not satisfied by Georgia's prosecution and sentence.

Alabama also has an interest in protecting its own residents from kidnapping and murder, in addition to its interest in protecting persons in general from such a crime. Georgia does not have a similar interest in protecting an Alabama resident such as Rebecca Heath. That Georgia's interest in this particular crime was not as great as Alabama's was demonstrated when Georgia allowed Petitioner, who had already made a full confession, to plead guilty to the lesser punishment for murder under its statute, life with parole eligibility. Ga. Code

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[26] Petitioner's Georgia crime, malice murder under Ga. Code 26-1101(a) (Appendix), is somewhat akin to intentional murder under Ala. Code § 13A-6-2(a)(1), which defines murder as intentionally causing the death of another person. The type of murder defined in § 13A-6-2 is the murder element of murder during a kidnapping in the first degree. Ala. Code § 13A-5-40(b) (Appendix). Whether "malice" murder in Georgia would be a lesser included offense of kidnapping/murder in Alabama is not clear. At times the Georgia courts seem to equate malice with intent. *Chandler v. State*, 230 Ga. 574, 198 S.E.2d 289 (1973). Elsewhere, however, malice is spoken of in terms of an "abandoned and malignant heart," *Davis v. State*, 237 Ga. 279, 227 S.E.2d 249 (1976); the relation between this and intent is in doubt.

§ 26-1101 (Appendix). Thus this Alabama interest was not satisfied by the Georgia prosecution.

That Alabama had an interest in Petitioner's prosecution different from Georgia's interest is also evidenced by the fact that Alabama sought and imposed the death penalty. This Court has previously recognized the "qualitative difference" between a sentence of death and a term of imprisonment. *Spaziano v. Florida*, 104 S.Ct. 3154, 3162 (1984). "There is no question that death as a punishment is unique in its severity and irrevocability." *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.). "It is an extreme sanction, suitable to the most extreme of crimes." *Id.* Alabama made the decision that Petitioner's crime was among those "most extreme of crimes," and therefore asked for this punishment.[27] Georgia, while it could have insisted on the death penalty, with a full confession by Petitioner, did not; instead it allowed Petitioner to plead guilty to the lesser punishment. Georgia's decision, while perhaps appropriate for the Georgia crime, cannot be said to have satisfied Alabama's interest in imposing the death penalty for what Alabama considered an extreme crime.[28]

Because Alabama's interests both in the victim and in the particular type of crime were different from Georgia's and were not satisfied by Georgia's prosecution, the conviction and sentence of Petitioner in Alabama for his Alabama crime should be affirmed even under Petitioner's own interest analysis approach.

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[27] The preposterous suggestion (Petitioners' brief, p. 21) that Alabama prosecuted Petitioner because he asserted his Fifth Amendment rights is totally unsupported by the record.

[28] *Ciucci v. Illinois*, 356 U.S. 571 (1958), cited by Petitioner, leaves open the question of whether repeated prosecutions by *one* sovereign simply in order to impose a death sentence violates due process. It says nothing about a prosecution by a second sovereign where the sentence imposed by the first sovereign falls short of the minimum sentence under the laws of the second sovereign.

III. PETITIONER'S REPEATED ARGUMENTS AS TO ALABAMA'S JURISDICTION OVER PETITIONER'S CRIME DO NOT RELATE TO THE ISSUES BEFORE THE COURT AND ARE LEGALLY INCORRECT.

Throughout Petitioner's brief he attempts to show that Alabama did not have jurisdiction over his crime. Petitioner's argument is irrelevant to the issues before this Court, and is also legally incorrect.

In Issue I of his brief in support of petition for writ of certiorari, Petitioner first advanced this argument regarding jurisdiction. No question of jurisdiction was decided in the court below. *Ex parte Heath*, 455 So.2d 905 (Ala. 1984). This Court granted certiorari only as to Issue II of the petition, concerning the applicability vel non of the dual sovereignty doctrine to successive state prosecutions. That jurisdiction has no relation to that double jeopardy issue is shown by the fact that the question of Alabama's jurisdiction would have arisen regardless of whether Georgia had prosecuted. The question of jurisdiction is therefore not before this court.[29]

Furthermore, Alabama has jurisdiction of this crime. The Alabama offense for which Petitioner was tried and convicted was murder during a kidnapping in the first degree, which consists of two elements, murder and kidnapping. *See, Ex parte Baldwin*, 372 So.2d 32, 33 (1979). Alabama may prosecute a crime where it commences in

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[29] Because jurisdiction is not before this Court, *Nielsen v. Oregon*, 212 U.S. 315 (1909), which in dicta limits the jurisdiction of adjoining states, is not pertinent. Petitioner's hypothetical situation (Petitioner's brief, p. 16) of six states prosecuting for the same kidnapping/murder is also irrelevant. To the extent that it concerns the limits of a state's criminal jurisdiction it does not relate to the issue before the Court. To the extent that it concerns double jeopardy it is also irrelevant to this case because six states are not prosecuting here, only two. In *Moore, Lanza, Abbate*, and *Wheeler* this Court has already determined that two governments may prosecute provided they are separate sovereigns.

Alabama and is consummated in another state. Ala. Code § 15-2-3 (Appendix). Because the crime commenced in Alabama Petitioner was properly tried and convicted in Alabama.

CONCLUSION

Respondent respectfully requests this Court to hold that Petitioner's double jeopardy rights were not violated by his prosecution and conviction in Alabama for the Alabama offense of murder during a kidnapping in the first degree after prosecution in Georgia for the Georgia offense of malice murder, and to affirm Petitioner's conviction and sentence in Alabama.

Respectfully submitted,

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APPENDIX

APPENDIX

Constitutional and Statutory Provisions Involved

United States Constitution, Fifth Amendment, provides in part:

> [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . .

Ala. Code, § 13A-5-39(1) provides:

> (1) CAPITAL OFFENSE. An offense for which a defendant shall be punished by a sentence of death or life imprisonment without parole according to the provisions of this article.

Ala. Code, § 13A-5-40 provides:

> (a) The following are capital offenses:
>
> (1) Murder by the defendant during a kidnapping in the first degree or an attempt thereof committed by the defendant;
>
> (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;
>
> (3) Murder by the defendant during a rape in the first or second degree or an attempt thereof committed by the defendant; or murder by the defendant during sodomy in the first or second degree or an attempt thereof committed by the defendant;
>
> (4) Murder by the defendant during a burglary in the first or second degree or an attempt thereof committed by the defendant;
>
> (5) Murder of any police officer, sheriff, deputy, state trooper, federal law enforcement officer, or any other state or federal peace officer of any kind, or prison or jail guard, while such officer or guard is

on duty or because of some official or job-related act or performance of such officer or guard;

(6) Murder committed while the defendant is under sentence of life imprisonment;

(7) Murder done for a pecuniary or other valuable consideration or pursuant to a contact or for hire;

(8) Murder by the defendant during sexual abuse in the first or second degree or an attempt thereof committed by the defendant;

(9) Murder by the defendant during arson in the first or second degree committed by the defendant; or murder by the defendant by means of explosives or explosion;

(10) Murder wherein two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct;

(11) Murder by the defendant when the victim is a state or federal public official or former public official and the murder stems from or is caused by or is related to his official position, act, or capacity;

(12) Murder by the defendant during the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewmen thereon or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Murder by a defendant who has been convicted of any other murder in the 20 years preceding the crime; provided that the murder which constitutes the capital crime shall be murder as defined in subsection (b) of this section; and provided further that the prior murder conviction referred to shall

include murder in any degree as defined at the time and place of the prior conviction; and

(14) Murder when the victim is subpoenaed, or has been subpoenaed, to testify, or the victim had testified, in any preliminary hearing, grand jury proceeding, criminal trial or criminal proceeding of whatever nature, or civil trial or civil proceeding of whatever nature, in any municipal, state, or federal court, when the murder stems from, is caused by, or is related to the capacity or role of the victim as a witness.

(b) Except as specifically provided to the contrary in the last part of subdivision (a)(13) of this section, the terms "murder" and "murder by the defendant" as used in this section to define capital offenses mean murder as defined in section 13A-6-2(a)(1), but not as defined in section 13A-6-2(a)(2) and (3). Subject to the provisions of section 13A-5-41, murder as defined in section 13A-6-2(a)(2) and (3), as well as murder as defined in section 13A-6-2(a)(1), may be a lesser included offense of the capital offenses defined in subsection (a) of this section.

(c) A defendant who does not personally commit the act of killing which constitutes the murder is not guilty of a capital offense defined in subsection (a) of this section unless that defendant is legally accountable for the murder because of complicity in the murder itself under the provisions of section 13A-2-23, in addition to being guilty of the other elements of the capital offense as defined in subsection (a) of this section.

(d) To the extent that a crime other than murder is an element of a capital offense defined in subsection (a) of this section, a defendant's guilt of that other crime may also be established under section 13A-2-23. When the defendant's guilt of that other crime is

established under section 13A-2-23, that crime shall be deemed to have been "committed by the defendant" within the meaning of that phrase as it is used in subsection (a) of this section.

Ala. Code, § 13A-6-2 provides:

(a) A person commits the crime of murder if:

(1) With intent to cause death of another person, he causes the death of that person or of another person; or

(2) Under circumstances manifesting extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, and thereby causes the death of another person; or

(3) He commits or attempts to commit arson in the first degree, burglary in the first or second degree, escape in the first degree, kidnapping in the first degree, rape in the first degree, robbery in any degree, sodomy in the first degree or any other felony clearly dangerous to human life and, in the course of and in furtherance of the crime that he is committing or attempting to commit, or in immediate flight therefrom, he, or another participant if there be any, causes the death of any person.

(b) A person does not commit murder under subdivisions (a)(1) or (a)(2) of this section if he was moved to act by a sudden heat of passion caused by provocation recognized by law, and before there had been a reasonable time for the passion to cool and for reason to reassert itself. The burden of injecting the issue of killing under legal provocation is on the defendant, but this does not shift the burden of proof. This subsection does not apply to a prosecution for, or preclude a conviction of, manslaughter or other crime.

(c) Murder is a Class A felony; provided, that the punishment for murder or any offense committed under aggravated circumstances, as provided by article 2 of chapter 5 of this title, is death or life imprisonment without parole, which punishment shall be determined and fixed as provided by article 2 of chapter 5 of this title or any amendments thereto.

Ala. Code, § 15-2-3 provides:

When commission of an offense commenced in the state of Alabama is consummated without the boundaries of the state, the offender is liable to punishment therefor in Alabama; and venue in such case is in the county in which the offense was commenced, unless otherwise provided by law.

Ga. Code § 26-1101 provides:

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

(c) A person convicted of murder shall be punished by death or by imprisonment for life.

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No. 84-5555 (6)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LARRY GENE HEATH,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Writ Of Certiorari To The Supreme Court of Alabama

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I

The State Of Alabama's Argument Concerning The Scope Of The Dual Sovereignty Exception Is Based Upon A Fundamental Misreading Of The Precedents Of This And Other Courts

The central theme, and crucial error, of Respondent's argument is that the precedents of this Court establish that "the application of the dual sovereignty doctrine depended solely on whether the two governments actually derived their power to prosecute from separate sources and were thus separate sovereigns." Respondent's Brief at p. 13. The Respondent's argument attributes to this Court a decision making process that places sole reliance on *a priori* definitions and that is not influenced by any other factor. Such a rigid and formalized approach finds no support in the cases of this Court. Rather, this Court has always examined the relevant institutional relationships that underlie claims of right grounded in assertions of sovereignty in the effort to resolve the competing claims of the litigants that appear before it. Indeed, just last term this Court made explicit its approach to questions of sovereignty when it rejected the attempt to rely on *a priori* definitions of sovereignty in *Garcia* v. *San Antonio Metro. Transit Authority*, 105 S.Ct 1005 (1985) and looked instead to the underlying institutional relationships. Id. at 1016-1017. Nor was *Garcia* an aberration. The case that *Garcia* overruled, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), employed the same analytical approach of looking beyond labels to the underlying interests. See Powell, J., dissenting in *Garcia*, 1055 S.Ct. at 1023-1024.

This is also the approach taken by the Court in its double jeopardy cases. As is discussed fully in Petitioner's Brief at pp. 22-35, this Court has examined the relevant institutional interests in determining the scope of the dual

sovereignty exception to the double jeopardy prohibition. The precedents of this Court are not to be searched in order to find a simplistic syllogism that controls decision, as Respondent asserts. Rather, those cases provide the framework with which complex questions of rights and obligations are resolved by an analysis that is sensitive to the various interests at stake. That this Court considers the implications of the various interests at stake in its resolution of the issues presented in litigation rather than simply relying on a rigid formalism based on *a priori* definitions is so clearly correct that it need not be discussed further.

Indeed, it bears pointing out that were this not so, the instant case would be very easy to decide. The simplistic rule that most easily can be extracted from this Court's previous dual sovereignty decisions is not that which Respondent asserts. It is instead that double jeopardy does not apply to two successive prosecutions for the same offense brought by fundamentally different governmental entities *that possess concurrent territorial jurisdiction*. The Respondent's own brief demonstrates this. Respondent asserts that *United States* v. *Lanza*, 260 U.S. 377 (1922) is "perhaps the leading case in this area of the law . . .," Respondent's Brief at p. 15, and that "The Court meant what it said in *Lanza* . . ." Id at 16. What the Court said in *Lanza* is: "We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject matter *within the same territory* . . ." *Lanza*, supra, at 382 (emphasis added). Were this Court to employ the state of Alabama's approach to decision making, the Court obviously would be compelled to reverse Mr. Heath's conviction. *Lanza* provides no authority in Respondent's rigid formalistic sense for the application of the dual sovereignty exception to a situation

of extra-territorial assertions of jurisdiction, as is present in the instant case. Moreover, *every dual sovereignty case decided by this Court involves concurrent territorial jurisdiction*. The state of Alabama would have this Court apply a rigid formalistic approach that picks and chooses among those aspects of the prior dual sovereignty cases that favor the state's claim while concomitantly ignoring those factors that are favorable to Mr. Heath. Obviously the state of Alabama cannot both press upon the Court a formalistic approach to decision making, and at the same time ignore the formal elements of this Court's precedents.

Respondent has not only fundamentally misread the dual sovereignty cases; Respondent also has misread those cases in this Court from different contexts that it relies on to establish the meaning of "sovereignty" and again for the same reason. On p. 22 of its Brief, Respondent cites to four of this Court's cases in an effort to bolster the argument concerning the nature of Alabama's sovereignty. As even a cursory reading of each of these cases makes clear, each one was engaged in an explication of the implications of a state's sovereignty within its borders. See, *Lane County* v. *Oregon*, 74 U.S. (7 Wall.) 71 at 76 (1869), *Bank of the United States* v. *Daniel*, 37 U.S. (12 Pet.) 32, 54-55 (1838); *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592 at 601 (1982), *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 at 428-30, 436 (1819). In this case, the state of Alabama is asserting the right to try Mr. Heath for an act that occurred in Georgia. Accordingly, its reliance on cases such as these to advance its notion of sovereignty is obviously misplaced.

As suggested above, notwithstanding the inherent shortcomings of the approach urged upon this Court by Alabama, the Petitioner would be quite content to have

this Court adopt the state's suggested formalistic approach to decisionmaking precisely because this Court has only approved the dual sovereignty exception in cases of concurrent territorial jurisdiction, which is not present in the instant case. In fact, after diligent search counsel for Petitioner has been unable to find any federal court at any level that has approved the extra-territorial application of the dual sovereigny exception to the double jeopardy prohibition, and the Respondent has cited no such case, either. At p. 25 of its Brief, the state of Alabama does cite seven state cases and one Tenth Circuit decision that it asserts supports the proposition that the dual sovereignty exception applies to successive state prosecutions, but once again Alabama has fundamentally misread the precedents upon which it relies. The only case that does support that proposition is *State* v. *Straw*, 626 S.W.2d 286 (Tenn. Crim. App. 1981), which is in reality a sham prosecution case and is discussed in full in Petitioner's Brief at p. 20. The remaining cases, discussed in the order they appear in Respondent's Brief, are:

1. *Wiley* v. *Altman*, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 371 (1981). The issue in *Wiley* was whether a prosecution for conspiracy to murder in Maryland precluded a murder prosecution in New York. The court held that it did.

2. *State* v. *James* 203 Md. 113, 100 A.2d 12 (1963). In *James*, the defendent had been convicted of nonsupport of his children in Delaware, where he was a resident at the time of the conviction. He subsequently moved to Maryland and three years later was prosecuted in Maryland for nonsupport, but only for the time he was a resident in Maryland.

3. *People* v. *Walker*, 123 Cal. App. 3d 981, 177 Cal. Rptr. 147 (1981). Defendant was convicted for possession

of stolen property in Nevada and for robbery in California, which are separate offenses.

4. *Hernandez* v. *State*, 397 So.2d 715 (Fla. Dist. Ct. App. 1981). *Hernandez* involved the traditional dual sovereignty exception as applied to a subsequent state prosecution following an earlier federal prosecution. It says nothing about successive state prosecutions.

5. *State* v. *Brown*, 441 N.E.2d 1126 (Ohio Ct. App. 1981). Defendant was prosecuted for kidnapping in Kentucky and rape in Ohio, which are separate offenses.

6. *State* v. *Glover*, 500 S.W.2d 271 (Mo. Ct. App. 1973). Defendant was prosecuted for burglary and theft in Missouri and for possession of stolen property in Kansas, which are separate offenses.

7. *Goldsmith* v. *Cheney*, 447 F.2d 624 (10th Cir. 1971). Defendant was prosecuted for conspiracy in Nevada and as an accessory in Wyoming. Because these are separate offenses, the court felt there was no need to discuss the dual sovereignty issue. Id at 628 n. 3.

The combined efforts of the parties in the present case have yielded only a single case where a defendant is unmistakably tried by two different states for the same offense, and that is *State* v. *Straw*, supra, which is a sham prosecution case. Accordingly, there is virtually no support for the proposition that the dual sovereignty exception should be extended to allow successive state prosecutions for the same offense. That proposition, in turn, puts the Respondent's position in stark relief. The state of Alabama is asking this Court to countenance a remarkable arrogation of power. As petitioner's Brief discusses at pp. 22-40, there is little justification for that arrogation of power in the policies of either the double jeopardy prohibition or the dual sovereignty exception.

Moreover, the paucity of case law at any level supporting the application of the dual sovereignty exception to allow successive state prosecutions for the same offense is in large measure a function of the fact that such cases simply are not brought with any frequency. The absence of such prosecutions speaks volumes about the "traditions and conscience of our people", which is one important component of constitutional adjudication. *Speiser* v. *Randall*, 357 U.S. 513, 523 (1958). There are few such prosecutions because this nation abhors multiple prosecutions and punishments for the same offense. Indeed, even in the federal/state context where dual sovereignty is most defensible, the principle is virtually unanimously lamented. See *United States* v. *Grimes*, 641 F.2d 96,104 (3rd Cir. 1981); *Commonwealth* v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971); *People* v. *Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976).

The state of Alabama has cited virtually no support for the extension of the dual sovereignty exception to a case of extra-territorial jurisdiction, and the state has obviously misread the cases upon which it does rely. Based upon that misreading, Alabama is asking this Court to approve what might be the first case where a defendant is tried twice for the exact same offense by two different states where there is not some other factor involved, such as one of the prosecutions being a sham. Alabama is unmistakably asking this Court to be the first court of last resort to countenance the first multiple prosecutions for the same murder, and in addition this case is apparently the first case in our nation's history where one state has attempted to prosecute for a murder committed within another state.[1] See, *People* v. *Holt*, 91 Ill.2d 480, 440 N.E.2d 102,

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[1] Since the Petitioner's Brief on the merits was written, counsel for Petitioner has found two other cases in addition to *People* v. *Gay*, 407

107 (1982) (No reviewing court has ever affirmed jurisdiction of felony murder on the basis of jurisdiction over the underlying felony). If that is to be done, it should not be done in reliance on the rigid formalistic approach pressed by the Respondent. Rather it should only be done by a careful analysis of the underlying interests involved. Those interests are fully discussed in Petitioner's Brief at pp. 22-40, where it is demonstrated that there is inadequate justification to extend the dual sovereignty exception to include successive state prosecutions for the same offense. That discussion will not be reiterated here. However, we will in the next section correct certain misunderstandings and mischaracterizations in the Respondent' Brief of the interest analysis discussed in the Petitioner's Brief.

Mich. 681, 289 N.W.2d 651 (1980), discussed in Petitioner's Brief at p. 22, n. 8, where multiple prosecutions for the same murder were brought. In *Coleman* v. *Tennessee*, 97 U.S. 509 (1878), the Court reversed a Tennessee conviction for murder because the defendant had previously been courtmartialled for that same offense committed while the defendant was serving in the Union Army in Tennessee while Tennessee was a belligerent. In *United States* v. *Barnhart*, 22 Fed. 285 (Circuit Court, D. Oregon, 1884), the defendants had been indicted for manslaughter under federal law for the killing of an Indian for which they had previously been acquitted in a state court. The defendants pleaded autrefois acquit to the federal indictment. The court held the state acquittal was not a bar to the federal indictment. The court based its decision in part on the dual sovereignty exception and in part on the grounds that the state acquittal might have been a sham: "No white man was ever hung for killing an Indian, and no Indian tried for killing a white man ever escaped the gallows." Id. at 289.

II

The State Of Alabama Has Mischaracterized Mr. Heath's Argument Concerning The Nature Of The Appropriate Inquiry Into The Scope Of The Dual Sovereignty Exception

As is discussed fully in Petitioner's Brief at pp. 22-26, the Court has applied the dual sovereignty exception where four conditions have been met: 1. concurrent territorial jurisdiction, 2. by governmental entities pursuing quite diverse interests, 3. where there is a risk of interference by one governmental entity in the affairs of another, 4. and where multiple prosecutions are necessary for the satisfaction of the legitimate purposes of each governmental unit. Alabama's Brief collapses this complex set of institutional concerns into a single dimensional "interest analysis" and purports to demonstrate how problematic its reconstruction of Mr. Heath's argument is. Respondent's Brief at pp. 25-30. We agree that the interest analysis as discussed in the state's Brief is somewhat problematic. However, what is discussed there bears little resemblance to Petitioner's argument.

Apart from being an oversimplified version of Mr. Heath's position, which is adequately demonstrated by comparing Respondent's Brief at pp. 25-30 to Petitioner's Brief at pp. 22-26, the primary error of the Respondent is its assertion that the effect of adopting Mr. Heath's argument would be to generate a horrible quagmire of difficult questions that would be presented in an endless stream of cases. The state of Alabama has obviously misread the Petitioner's Brief. As is discussed there in full at pp. 22-31, this Court has applied the dual sovereignty exception only where each of the four conditions cited above has been met. One of those is an analysis of the relevant institutional relationships in order to determine whether the possibility of undesirable intergovernmental conflict is so

great that two prosecutions for the same offense must be allowed, notwithstanding the deleterious impact of that conclusion on an individual's right to be placed in jeopardy a single time for a single offense. Thus, it has been this Court that has looked at these questions in order to determine the scope of the dual sovereignty exception to the double jeopardy prohibition. Petitioner is merely advancing the proposition that this Court should, once again, follow that same approach. Consequently, the lower courts will not be bedeviled by difficult questions if this Court resolves the double jeopardy question in Mr. Heath's favor. The State's argument, in short, is really quite beside the point.[2]

It also bears reiterating that the instant case is relatively easy to resolve in terms of the relevant institutional concerns. This is discussed in Petitioner's Brief at pp. 36-37, and will not be repeated here. The state's responses

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[2] In Part III of Petitioner's Brief an argument is made that, if the Court extends the dual sovereignty exception to successive state prosecutions, defendants should at least be allowed to demonstrate that the second prosecution served no separate state interest. Should the Court adopt this position, it is the defendant, not the prosecuting authorities who will be "bedeviled" by the questions raised by Respondent. Moreover, Respondent's assertions that an interest analysis in individual cases would be difficult to administer is belied by the facts. States typically do not allow successive prosecutions for the same offense regardless whether the first prosecuting authority is the federal government or another state. The second prosecution is typically allowed only when it serves a distinct social interest from the first prosecution. Contrary to the implication of Respondent's parade of horribles, Respondent's Brief at 25-30, the cases indicate no difficulty in making that determination. See, e.g., *Commonwealth* v. *Mills*, 447 Pa. 163, 286 A.2d 638 (1971); *People* v. *Cooper*, 398 Mich. 450, 247 N.W.2d 866 (1976); *Wiley* v. *Altman*, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 37 (1981); *Hernandez* v. *State*, 397 So.2d 715 (Fla. Dist. Ct. App. 1981).

to this position are quite enlightening, and upon being sorted out demonstrate what little justification there is to allow successive state prosecutions for the same offenses:

1. On pp. 31-32, the State asserts an interest "in seeing that persons who violate its laws receive the degree of punishment provided under Alabama law," id. at 31. Alabama, in short, is dissatisfied with the life sentence Mr. Heath received in Georgia, and wishes to punish him more severely. A mere desire to increase the punishment a person receives is hardly an adequate reason to justify an exception to the double jeopardy prohibition, however. To the contrary, one of the purposes of the double jeopardy prohibition is precisely to insulate a defendant from repeated attempts to increase his sentence, especially—as is true in Mr. Heath's case—where the effort is designed to obtain the death sentence. *Ciucci* v. *Illinois*, 356 U.S. 571, 573 (1958). In addition, Alabama is in the curious posture of being dissatisfied with a sentence imposed in Georgia for a criminal act that occurred in Georgia. Thus, Alabama is essentially arguing for the right to police through internal prosecution the sentences given by other states for acts occurring in those states. Petitioner respectfully suggests that Alabama's "interest" in such a matter is hardly a compelling one.

2. The state of Alabama also asserts an interest in protecting its own citizens and makes the remarkable suggestion that the state of Georgia is not as concerned about the lives of Alabama's residents while they are in the state of Georgia as is the state of Alabama. Respondent's Brief at 31. However, Alabama cites no support for this ascription of callousness to the state of Georgia. Moreover, it is difficult to comprehend how the prompt investigation and conviction of Mr. Heath for murder in Georgia lends support to this allegation. In addition to

there being no support whatsoever for Alabama's allegation, there is also no support for the assertion of jurisdiction on this basis. Alabama is implicitly asserting the right to try an offense commited extra-territorially upon one of its citizens. It cites no authority allowing it to do so, and the reason is that no such authority exists. See Blakesley, *A Conceptual Framework For Extradition And Jurisdiction Over Extraterritorial Crime*, 1984 Utah L. Rev. 685, 715-16.

3. The state of Alabama also asserts that there will be deleterious consequences to the administration of justice if this Court does not expand the dual sovereignty exception to include successive state prosecutions. In particular, Alabama asserts that if multiple prosecutions are not allowed "Prosecutors may find it necessary to rush their cases to trial rather than risk being precluded under a [sic] uncertain test," Respondent's Brief at 29, and "Prosecutors may be anxious to make [certain] deals, even to lesser included offense, rather than take a chance on being beaten to the courthouse by another state." Id. at 29-30. These are hardly serious concerns. The only effect of this Court not expanding the dual sovereignty exception to include successive state prosecutions for the same offense would be to preclude two prosecutions for the same offense where concurrent jurisdiction exists. Those cases are quite rare; as the Alabama Prosecutor told the jury at Mr. Heath's trial: "This is a rather unique case." Trial Record at 304. He certainly is correct; as discussed above there are virtually no cases of successive prosecutions for the same offense. Thus, it is difficult to understand who will be doing all the "rushing" about in order not "to be beaten to the courthouse" that Alabama is concerned about. Moreover, Alabama's discussion suggests that prosecutors are in some kind of competition

with each other. Petitioner knows of no support for such a view, and Respondent provides none. We would suggest that a much more plausible description of the normal inter-office relationship of prosecutors is that prosecutors co-operate with one another. The only effect of a decision in favor of Mr. Heath would be to encourage that healthy co-operation that surely occurs today as a matter of course (as the joint investigation by Alabama and Georgia in the instant case confirms). Moreover, if some unusual case comes along where a prosecutor in one state agrees to allow a defendant to plead to a very low charge in order to insulate him from charges in another state, the doctrine of sham prosecution is sufficient to handle the problem. What the state of Alabama has done, though, is to use the possibility of such an unlikely event as the justification for a large reduction in the scope of the double jeopardy prohibition, and consequently its argument is not compelling.

III

The State Of Alabama's Assertion That It Has Jurisdiction Over The Homicide Committed In Georgia Is Insupportable

In Part III of its Brief, Respondent asserts that Petitioner's Brief "attempts to show that Alabama did not have jurisdiction over [Mr. Heath's] crime." Id. at 33. Respondent is correct that Petitioner is of the view that Respondent lacks jurisdiction over the homicide that occurred in Georgia, and further that it was an egregious default of professional responsibility on the part of Petitioner's counsel before the courts of Alabama not to raise the absence of jurisdiction as a violation of fourteenth amendment due process, thus precluding raising that issue on direct appeal to this Court. Nonetheless, Petitioner's Brief does not attempt to argue that Alabama

lacks jurisdiction. Petitioner's Brief explicitly assumes Alabama had jurisdiction and argues that the dual sovereignty exception should not be applied where the defendant has already been tried in the state where the crime occurred and where the second prosecuting state is attempting to exercise extra-territorial jurisdiction. Petitioner's Brief at p. 15. In short, Respondent has seriously mischaracterized Petitioner's argument. In addition to mischaracterizing Petitioner's position, Alabama also makes an affirmative argument that it possesses jurisdiction of this homicide that calls for at least a brief response. Respondent's Brief at 33-34.

Alabama justifies its jurisdiction in this case on a state statute that grants jurisdiction when an offense is "commenced" within the state. Id. at 34. Ala. Code § 15-2-3 (Reproduced in Respondent's Brief Appendix A). Such statutes have been enacted in recent years to deal with a serious problem. Acts may be put in motion in one state leading to a criminal offense, and the forbidden result may occur in another, thus raising questions as to where the perpetrator may be tried. In order to facilitate prosecution in such cases, statutes such as Alabama's have been enacted, and some courts have reached a similar conclusion through the common law process. See generally Comment, *Jurisdiction Over Interstate Felony Murder*, 50 U. Chi. L. Rev. 1431 (1983).

The state of Alabama would apparently have this Court believe that its assertion of jurisdiction over the homicide that occurred in Georgia is an uncontroversial application of such a statute. That is not so, however. The "crime" for which Alabama is purporting to prosecute Mr. Heath is in reality two separate offenses—murder and kidnapping. By a definitional exercise based upon Alabama Criminal Code § 13A-5-40 (a)(1) (reproduced in Appendix A of Peti-

tioner's Brief) Alabama has combined these two offenses into a single offense. Under Alabama law, the only capital crimes are murders committed under certain forms of aggravation. A number of those types of aggravation are that a murder is committed in connection with some other felony, including murder during a kidnapping which is involved in Mr. Heath's case. In such a case, § 13A-5-40 allows the death penalty to be imposed if the separate offenses of murder and kidnapping are established. That §13A-5-40 relates these two offenses for punishment purposes and does not create a new offense is evident from the title of Chapter 5 of the Alabama Criminal Code, which contains §13A-5-40. The title is "Punishments and Sentences." The state of Alabama is attempting to employ this sentencing scheme to bootstrap itself into jurisdiction of the murder that occurred in Georgia. Its precise method of doing so is to assert that this sentencing scheme creates new "crimes" and that Mr. Heath's single crime created by this ostensible sentencing provision began in Alabama with a kidnapping.

Alabama's jurisdictional theory raises grave problems. There are only two ways to conceptualize what it has done, and both are very problematic. The first is that Alabama may be asserting the right to redefine criminality in such a way that would lead to a drastic change in the administration of criminal justice. Alabama may be asserting the right to define crimes that link together as a new offense what heretofore had been separate offenses and punish all of them through this new linkage on the grounds that one of them occurred in Alabama. This would allow Alabama to take jurisdiction over any offense committed anywhere so long as some other related offense was committed in Alabama. Needless to say, this would amount to a drastic reordering of criminal jurisdic-

tion in this country. In addition it would expose offenders to the risk of multiple trials and punishments for the same offense, because Alabama also claims the right to try someone for one of its new "offenses" even though the defendant has previously been tried in another state for the traditional offense incorporated into Alabama's new conception of criminality.

The second way to conceptualize Alabama's assertion of jurisdiction in this case is even more troublesome. The reality of the Alabama statutes relevant to this litigation is that murder is the offense and kidnapping is an aggravating factor relevant to sentencing. See, e.g., *Ex Parte Dobard*, 435 So. 2d 1351, 1359 (Ala. 1983). Thus, the alternative theory that may underly its assertion of jurisdiction in this case is that whenever a matter relevant to sentencing occurs within Alabama, Alabama has jurisdiction over the subsequent crime no matter where it is committed and regardless whether the relevant offense had already been tried in the state where it was committed. Indeed, that is apparently what it means for a crime to "commence" in Alabama in the state's view. This theory would work an obvious and drastic change in the administration of criminal justice in this country. See, e.g., *People* v. *Holt*, 91 Ill.2d 480, 440 N.E.2d 102 at 104 (1982).

Either of these theories would explain Alabama's assertion of jurisdiction in Mr. Heath's case. One way to view this case is that Alabama has combined the separate offenses of murder and kidnapping into one crime. The other is to view it as a case where a factor relevant to sentencing—the kidnapping—occurred within the state and the relevant crime—the murder—occurred elsewhere.

Regardless of which theory properly explains Alabama's assertion of jurisdiction in this case, the result is highly problematic and leads to remarkable conclusions. Just how remarkable is sufficiently demonstrated by the instant case where Alabama purports to have the authority to try Mr. Heath for a murder that occurred in Georgia and where Mr. Heath had already been convicted of that offense in that state. One more example of the scope of Alabama's theory of jurisdiction may be useful, however. Another subsection of the Alabama Criminal Code makes it a "capital offense" for a person previously convicted of murder within twenty years to commit another murder. Alabama Criminal Code § 13A-5-40(a)-(13) (Reproduced in Appendix A to Petitioner's Brief). The previous murder is analogous to the kidnapping in Mr. Heath's case and would form the basis of Alabama's assertion of jurisdiction. What that means is that if someone is convicted of murder in Alabama and subsequently commits another murder within 20 years anywhere at all (presumably "even on the moon," Joint Appendix at 58, Trial Record at 610-11), then that person commits a capital offense in Alabama. Petitioner respectfully suggests that such a drastic reordering of the administration of criminal justice ought not to be countenanced.

Respondent is in error, then, in its assertion that Petitioner in its brief contested Respondent's jurisdiction over the murder. Respondent is correct, however, that Petitioner is of the view that Alabama does not have jurisdiction over the homicide that occurred in Georgia. Moreover, it also bears pointing out that counsel for the Petitioner should have discussed the jurisdiction issue in his Brief. In *Lanza*, supra, at p. 384, this Court cited with approval the following passage from *Southern Ry. Co.* v. *Railroad Commission of Indiana*, 236 U.S. 439, 445 (1915):

> In support of [dual sovereignty] numerous cases are cited which hold that the same act may constitute a criminal offense against two sovereignties, and that punishment by one does not prevent punishment by the other. That doctrine is thoroughly established. But, upon an analysis of the principle on which it is founded, it will be found to relate only to cases where the act sought to be punished is one over which both sovereignties have jurisdiction (citation omitted).

As this passage makes clear, the dual sovereignty exception is premised upon both sovereigns having jurisdiction of the relevant crimes, and without jurisdiction the dual sovereignty exception does not apply. Accordingly jurisdiction is a necessary component of the application of the dual sovereignty exception. This Court granted certiorari on the issue of the applicability of the dual sovereignty exception to successive state prosecutions. A grant of certiorari extends to all issues reasonably included within the question presented. Sup. Ct. R. 21.1 Jurisdiction, being a necessary ingredient of the application of the dual sovereignty exception, is obviously subsumed within the grant of certiorari on the larger question of the scope of the dual sovereignty exception. Accordingly, the question of Alabama's jurisdiction over the murder in Georgia is properly before the Court, and the Court should not countenance Alabama's extraordinary arrogation of power to try events unmistakably within the jurisdiction of its sister states.

CONCLUSION

Petitioner respectfully requests that the Court hold that his rights under the double jeopardy clause and the due process clause of the fourteenth amendment were violated by his being prosecuted by the state of Alabama for the same capital murder for which he was previously prosecuted by the state of Georgia and accordingly that the Court reverse Petitioner's Alabama Conviction for murder and remand Mr. Heath to the Georgia authorities to continue serving his sentence of life imprisonment. Alternatively, this Court should remand this case to the Alabama courts to allow Mr. Heath to demonstrate that his prosecution in Alabama served no different interests from his prosecution in Georgia and thus that his double jeopardy rights were violated by his prosecution in Alabama.

Respectfully submitted,

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